

FINANCIAL SERVICES AND GENERAL GOVERNMENT APPROPRIATIONS FOR FISCAL YEAR 2009

WEDNESDAY, MAY 14, 2008

U.S. SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 3:35 p.m., in room SD-192, Dirksen Senate Office Building, Hon. Richard J. Durbin (chairman) presiding.

Present: Senators Durbin and Brownback.

FEDERAL TRADE COMMISSION

**STATEMENT OF HON. WILLIAM E. KOVACIC, CHAIRMAN
ACCOMPANIED BY HON. JON LEIBOWITZ, COMMISSIONER**

OPENING STATEMENT OF SENATOR RICHARD J. DURBIN

Senator DURBIN. Good afternoon. I'm pleased to welcome you to this hearing today before the Financial Services and General Government Appropriations Subcommittee.

I apologize for the late start. We had a rollcall vote on the floor, and Senator Reid was called to a funeral service in Arlington for a fallen soldier from Nevada, and I had to fill in for a few minutes there. I thank Senator Brownback as well for his patience in waiting for my arrival.

Today's hearing focuses on the President's fiscal year 2009 budget request for the Federal Trade Commission (FTC). Testifying before us this afternoon is Chairman William Kovacic and Commissioner Jon Leibowitz.

I welcome my colleagues to the dais and those who will appear in short order.

The FTC, Federal Trade Commission, has two important and related missions: to protect consumers and to preserve competition in the marketplace. These missions really hit home when it comes to American consumers as they face skyrocketing prices at gasoline pumps, struggle with home mortgages they may not be able to pay back, and worry about identity theft and privacy in our increasingly intrusive world. The FTC pursues both of its consumer protection and competition missions by identifying illegal practices, stopping them through law enforcement, and preventing them through consumer and business education. It also adds to the public knowledge and dialogue by conducting research, advocating for consumers, and representing American consumer interests.

I am pleased to see the FTC has a strong record on these missions. The agency has received numerous awards for its consumer education programs. Its implementation of the Do Not Call program has enjoyed success in curbing most unwanted telemarketing calls. There are still some of them getting through we will have to talk about. And last year, the FTC received a clean audit opinion for the 11th straight year in a row. Congratulations. With these and other accomplishments, I think the FTC has much to be proud of.

The President's budget requests \$256.2 million for fiscal year 2009, increased \$12.3 million, or about 5 percent, over current year funding. This request will provide additional funding for consumer protection, including three additional FTE's dedicated to financial services. I am glad you are looking in this area. We are all too familiar with the fraud and deception in the mortgage industry, so this is certainly a good idea.

This request also would provide additional funding for the FTC's Competition Bureau, including eight additional FTEs. Your role as consumer watchdog for anticompetitive behavior is especially crucial in today's market for gasoline, diesel fuel, and jet fuel.

As you know, based on a letter I recently sent to you, I am very concerned about the spike in fuel prices. Drivers across America are paying higher and higher prices at the pump. Air travelers and consumers are also feeling the heat. Projections suggest the situation could get worse. Yet, somehow these record-breaking prices are coming at a time when the oil industry is reporting record-breaking profits.

This chart points out something that an executive from an airline told me just a couple weeks ago when we talked about the increasing cost of jet fuel and what it was doing to the airline industry across America. He had made a phone call to a chief executive officer (CEO) of the same airline who had his job about 15 to 20 years ago, and this former CEO said, I do not understand how you can even operate with the so-called crack spreads today, crack spread being the difference between the crude oil and the refined product.

That differential used to be in the \$1 to \$5 range. Now it is in the \$40 range. And so as you see the price of a barrel of oil going up—I do not know what it is today. I think yesterday it was \$127—you have to know that ultimately the consumer will pay even more because the spread between crude oil and refined product just continues to grow exponentially, making it increasingly difficult to be competitive for all users of refined oil products. That would include families, businesses, farmers, truckers, airlines, transit agencies, and all of the above.

I am happy that you will be here to testify about this and other issues, perhaps commenting on the letter that I sent requesting an inquiry. And before turning it over to you for presentation, I would like to invite my colleague, Senator Brownback, to speak.

STATEMENT OF SENATOR SAM BROWNBACK

Senator BROWNBACK. Thank you, Mr. Chairman, for holding the hearing. I look forward to the presentation that is going to be coming up from our colleagues and to our question and answer session.

I think this is an important hearing on some very substantive issues.

I have worked with the FTC over many years on a number of topics, and I have found the Commission very good to work with. I appreciate their mission. I think it is crucial and a delicately balanced one of protecting consumers from fraud and predatory scams, while at the same time not interfering with legitimate business activities. Protecting consumers from identity theft and credit fraud, enforcing the Do Not Call Registry, and prohibiting the marketing of media violence to children, the Commission has a valuable role in our Government.

To carry out its mission, the FTC must look carefully at the facts to guide its efforts. It cannot rely on anecdotes or speculation. It is a difficult function. It requires objective inquiry, analysis, and deliberation. It is not a function that can be exercised properly by a rush to judgment that is based on a theory or popular opinion.

Mr. Chairman, all of us are very concerned and troubled by the exorbitant prices that consumers are paying at the pump. In my State and across the country, farmers, truck drivers, and all working families are facing painfully high prices to put gas in their cars and trucks and to put food on their tables. I would say, Mr. Chairman, if oil companies have acted in an anticompetitive fashion that has harmed consumers, then throw the book at them. I have no qualms about doing that whatsoever, and it should be done and it should be the function of the Government to do it.

Now, let us make sure that they are not colluding and engaging in anticompetitive activities. We must do that. But let us base those claims on facts and not anecdotes and let us find answers and not excuses. And we must pursue real solutions rather than political gain.

In the same way that we admonish our colleagues not to scapegoat ethanol for rising food prices here in the United States and abroad, we need to examine carefully the data and facts surrounding higher gasoline prices. As you and I know, Mr. Chairman, if it were not for the increased use of ethanol and the blending of gasoline, prices at the pump would be some 29 cents to 40 cents higher per gallon. That may explain in part why crude oil prices have risen faster and further than prices at the pump, and we have a chart that I wanted to show on this.

Since January of this year, crude prices are up 21 percent, while gasoline prices are up 19 percent. Since January 2007, the difference is even more pronounced. Crude prices are up 106 percent while gasoline prices are up 94 percent.

The latest data from the Energy Information Administration (EIA) in March 2008 shows that 71.8 percent of the price of a gallon of gasoline is attributable to the raw crude oil input. In March 2007, crude oil accounted for only 52.3 percent of the cost of a gallon of gasoline. In March 2000, crude oil accounted for 44.6 percent of a gallon of gasoline. And that is on the charts.

Crude oil costs are the unmistakable driving force behind the rise in gasoline prices, and for that we need to look in part at our own body here. We have made choices to refuse to allow drilling off the continental shelf and in Arctic National Wildlife Refuge (ANWR). We have chosen to allow antidevelopment and, I believe,

antigrowth activists to block any attempt to expand our Nation's refining capacity. We need to revisit those decisions just as much as we need to examine the behavior of private enterprises.

It is unfortunate the Government is not called to task for its own role in distorting markets and placing increased costs on consumers. Decisions that our Government has made regarding energy policy have contributed to the higher prices that consumers are now paying. And even though the percentage of retail gasoline prices and taxes represent a decline from 32.1 percent in January 2000 to 12.3 percent in March 2008, the actual amount of the tax has not. In January 2000, taxes accounted for 41.4 cents per gallon. In March 2008, they accounted for 39.9 cents per gallon.

I urge the FTC to use its resources to examine diligently and thoroughly all aspects of this issue. In the past, FTC has determined, except in a few isolated cases, that market forces were responsible for large changes in gasoline prices, not anticompetitive actions by the industry. But if you find those anticompetitive actions, we want to know about it and we want them pursued. Let us not think that we need to change the rules or alter the objectivity of scientific analysis and facts just to get the answer we want.

I want to thank you, Mr. Chairman, for holding this hearing. I look forward to the testimony of the witnesses and a chance to question them.

Senator DURBIN. Thank you, Senator Brownback.

As you can tell, we have a slightly different view of the world, and luckily the Federal Trade Commission is here to be the ultimate arbiter.

We want to thank Chairman Kovacic, who will be allowed to make an opening statement, followed by Commissioner Leibowitz. Mr. Chairman.

SUMMARY STATEMENT OF WILLIAM E. KOVACIC

Mr. KOVACIC. Thank you, Chairman Durbin and Ranking Member Brownback. You could not have put the arbitration position in better hands.

We are delighted to have the opportunity to speak to the budget request and to give you a sense of how we would use the funds that have been sought. To divide the labor today, I would like to talk a bit about the competition mission, and my colleague, Commissioner Leibowitz, will address the consumer protection mission.

I want to talk about several areas that are examples of the respects in which I think this true modern success story in public administration provides an excellent return to consumers for the resources you have entrusted us with. Our basic philosophy in competition policy, I think, truly matches the intuition that motivates both of your comments about what we should be doing. We try to use our resources in areas that are of the greatest concern to consumers, and we have tried to address them by using the varied tools you put at our disposal. You not only made us, nearly a century ago, a law enforcement agency, but you entrusted us with research capabilities to get underneath the surface, to understand more fundamentally what is going on in our industries, and to not simply use the prosecution of lawsuits, but the formulation of rules,

consumer education, and publicity as tools for formulating adjustments that we can control ourselves, but advising you as well about what policies should do.

Let me single out several areas of principal concern to us, the areas, among others, in which we will devote our efforts in the competition area with the proposed budget of \$256 million.

First and foremost, energy. I share your view that there is no single field of endeavor for us that is more important to the American public, and we expect to approach it, among other areas, in two ways.

As you know, earlier this month we issued an advance notice of proposed rulemaking to explore approaches for applying the market manipulation authority that this body gave us in December. We anticipate that the rulemaking process will be concluded in this calendar year, and there is nothing that my colleagues and I will devote more effort to see addressed as expeditiously and effectively within our agency.

At the same time, we are deeply concerned with structural changes in this sector that can affect the price at which petroleum products, natural gas, other energy products are delivered to consumers. Within the past 12 months, we challenged a natural gas distribution merger in Pittsburgh, which ultimately resulted in the abandonment of the transaction. We brought a case against a combination of two refiners in the southwestern United States involving Western refining and Giant industries. In this we were unsuccessful in obtaining a preliminary injunction. But both matters are indicative of our willingness in all areas to scrutinize very carefully structural adjustments or proposed changes in the industry that would affect competition in this sector.

The second area that is certainly close behind is health care. Two priorities I want to flag for you. The first is our continuing commitment to monitor and to challenge anticompetitive pay-for-delay settlements. Our prosecution of the *Cephalon* case is the latest in our efforts to ensure that the arrangements that Congress set in place with the Hatch-Waxman Act and the promise of lower prices through the provision of generic drugs to consumers are not lost. And even though we have suffered setbacks in a couple of these matters in the courts of appeals, we will continue to press as effectively as we can for successful judicial resolution of these matters. Cephalon is part of our commitment in that area.

We are here also examining structural changes in the sector. Only recently we filed a challenge to a merger in northern Virginia that involves hospital providers, INOVA and the Prince William County Health Care System, again an indication of our commitment to monitor structural changes in this and other important sectors that would affect the price that consumers pay for healthcare.

In the real estate area, we have brought cases involving what we feel are inappropriate arrangements involving multiple listing services.

In the area of standards setting, we were unsuccessful in our *Rambus* case, but within the past couple of years, our successful challenge to an effort by Unocal to distort the process by which the State of California sets standards for gasoline to be sold in that

State, resulted in a settlement that has yielded, we believe, benefits of at least \$500 million a year to consumers.

And the last item I want to mention is the very generous allotment that this subcommittee and the Congress as a whole gave us to pursue international matters. We have extended our efforts to work more effectively with our counterparts abroad to provide technical assistance to new competition systems, China, India, among others, and to pursue effective international cooperation under the framework of the SAFE WEB legislation that Congress also enacted in 2006.

PREPARED STATEMENT

Last, I want to mention that we are undertaking a basic self-assessment. We are looking ahead to our centennial in 2014, and we are going to be asking ourselves, with respect to all areas of our operations, are we the agency that Congress intended us to be, what steps can we take to get there? This will fold well into other areas in which Congress has directed us: to examine ourselves, to identify our possibilities for greatness, and to allow no power persuasion to deter us from that mission.

Thank you.

Senator DURBIN. Thank you, Mr. Chairman.

[The statement follows:]

PREPARED STATEMENT OF HON. WILLIAM E. KOVACIC

INTRODUCTION

Chairman Durbin, Ranking Member Brownback, and members of the subcommittee, thank you for inviting us to testify today in support of the Federal Trade Commission's (FTCs) fiscal year 2009 appropriation request and to discuss some of the work we will be doing next year. The Commission looks forward to working with you to further the interests of American consumers.

The FTC, though small, is the one Federal agency with both consumer protection and competition jurisdiction across broad sectors of the economy. It enforces, among a broad range of other laws, Section 5 of the Federal Trade Commission Act, which prohibits business practices that are harmful to consumers because they are anti-competitive, deceptive, or unfair.

The Report attached to this testimony, "The FTC in 2008: A Force for Consumers and Competition" provides a detailed overview of the scope of our work. The FTC has pursued a vigorous and effective law enforcement program in a dynamic marketplace that is increasingly global and characterized by changing technologies. Through the efforts of a dedicated staff, the FTC continues to handle a growing workload. This testimony summarizes the FTC's budget request for fiscal year 2009, and describes some of its major activities. To meet the challenges of our Consumer Protection and Maintaining Competition goals in fiscal year 2009, the FTC requests \$256,200,000 and 1,102 FTE. The fiscal year 2009 request represents an increase of \$12,336,000 and 18 FTE over the fiscal year 2008 enacted levels.

Looking further into the future our success will require continued efforts to improve the institutional mechanism through which we execute our responsibilities. In the coming months we will undertake a program to identify the way ahead. Our focus will extend beyond the next few years, and we will ask what the Agency should look like when our centennial arrives in 2014, and beyond. This self-assessment will include a combination of internal deliberations and external consultations in the United States and overseas with the community of Government and non-Government bodies that have an interest in competition and consumer protection policy.

CONSUMER PROTECTION MISSION

In the consumer protection area, the Commission is active in a variety of efforts to protect the public from unfair, deceptive, and fraudulent practices in the marketplace, including law enforcement targeting telemarketing fraud, deceptive marketing of health care products, consumer fraud against Hispanics, and business op-

portunity and work-at-home schemes. The Commission also has an active program of consumer and business education and outreach. This testimony highlights seven key priorities for the FTC in fiscal year 2009: financial practices; technology (spyware, spam, and behavioral advertising); Do Not Call; privacy and data security; green claims; food marketing to children; and entertainment industry marketing to children.

Financial Practices

The Commission will continue its important work to protect consumers of financial services, focusing on every stage of the consumer credit life cycle, from the advertising and marketing of financial products to debt collection and debt relief. The Commission is particularly concerned at this time about the rise in mortgage foreclosures and delinquencies in the subprime market and its impact on communities.

In the past decade, the Agency has brought 22 actions focused on the mortgage lending industry, with particular attention to the subprime market, alleging that lenders and servicers have engaged in unfair and deceptive advertising and mortgage servicing practices. Through these cases, the FTC has recovered more than \$320 million for consumer redress. In addition, these cases serve as notice to the industry generally not to engage in the practices identified as unfair or deceptive. Most of these mortgage cases are complex and take considerable resources to investigate and prosecute, often requiring considerable litigation, in order to obtain adequate redress for consumers and other remedies. The Commission continues its important work in this area.

The Agency is currently investigating the ads of a dozen companies for improperly promoting mortgage products, such as ads that announce low “teaser” rates without explaining that those rates apply for a short period of time and can increase substantially after the loan’s introductory period. Commission staff has reviewed hundreds of mortgage advertisements and sent warning letters to 200 mortgage lenders because their ads did not appear to comply with laws the Commission enforces. Staff is examining these companies’ more recent advertisements and, where they are noncompliant, the Commission will follow up by bringing cases.

With the rapid increase in mortgage delinquencies and foreclosures, the FTC has also intensified its efforts to protect consumers from mortgage foreclosure rescue scams. Most of these cases involve allegations of scammers who falsely promise that they can save consumers’ homes from foreclosure.¹ Since February of this year, the Commission has announced four cases targeting such foreclosure rescue scams.² Commission staff also continues to conduct outreach and to share enforcement resources with State and local authorities through seven regional task forces in cities with high foreclosure rates.

The Commission’s actions to protect consumers of financial services extend beyond mortgage lending to a wide range of non-mortgage financial services. Earlier this year, the Commission announced that three payday lenders agreed to settle FTC charges that their advertising violated the Truth in Lending Act by failing to provide interest information required by Federal law. This information helps consumers

¹In testimony on February 13, 2008 before the Senate Special Committee on Aging on foreclosure rescue fraud, the Commission set forth a more complete description of the FTC’s efforts to address such fraud. The FTC’s testimony is available at <http://www.ftc.gov/os/testimony/P064814foreclosure.pdf>.

²*FTC v. Safe Harbour Foundation*, No. 08 C 1185 (N.D. Ill. filed Feb. 25, 2008), available at <http://www.ftc.gov/os/caselist/0823028/index.shtm>; *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08 CV-00388 (M.D. Fla. filed Feb. 26, 2008) available at <http://www.ftc.gov/os/caselist/0823021/index.shtm>; *FTC v. National Homestead Solutions, Inc.*, No. 4:08-CV-00067 (E.D. Tex. filed Feb. 26, 2008), available at <http://www.ftc.gov/os/caselist/0823076/index.shtm>. *FTC v. Foreclosure Solutions, LLC*, No. 1-08-CV-01075 (N.D. Ohio filed Apr. 28, 2008), available at <http://www.ftc.gov/os/caselist/0723131/index.shtm>. Last month, The Bear Stearns Companies, Inc. (“Bear Stearns”) disclosed that FTC staff has notified its mortgage servicing subsidiary, EMC Mortgage Corporation (“EMC”), that the staff believes EMC and its parent Bear Stearns have violated a number of Federal consumer protection statutes in connection with its servicing activities. Bear Stearns further disclosed that FTC staff offered an opportunity to resolve the matter through consent negotiations before seeking approval from the Commission to proceed with the filing of a complaint. According to the disclosure, EMC expects to engage in such discussions with Commission staff. Form 10-K, Bear Stearns Mortgage Funding Trust 2007-AR4 (CIK No. 1393708), at Item 1117 of Reg AB, Legal Proceedings (filed Mar. 31, 2008), available at www.sec.gov/Archives/edgar/data/1393708/000105640408001164/000105640408001164.txt. The FTC cannot comment further on this ongoing law enforcement investigation.

compare the costs of these payday loans to other payday loans and to alternative forms of short-term credit.³ The settlements have been accepted for public comment.

In this economy, consumers with high levels of debt are particularly vulnerable to debt collection abuses, as well as debt negotiation and debt consolidation scams. Last November, the Commission announced its largest civil penalty in a debt collection case \$1.375 million.⁴ In addition, the Commission has prosecuted more than 60 companies engaged in deceptive debt negotiation, debt consolidation, and credit repair practices. The Commission plans to continue its important work in this area in fiscal year 2009.

Technology (Spyware, Spam, and Behavioral Advertising)

The Commission has been at the forefront of protecting consumers from such technological threats as spam and spyware. The Agency has brought more than 100 spam and spyware cases. Earlier this year, the Agency announced its largest civil penalty in a spam case \$2.9 million against a company allegedly using deceptive email to offer “free” gifts that were not, in fact, free.⁵

In addition, the Agency identifies and studies potential consumer protection issues raised by new technologies. For example, last week, the Commission hosted a town-hall meeting on mobile marketing, which examined such topics as consumers’ ability to control mobile applications; the challenges presented by small screen disclosures; practices targeting children and teens; evolving security threats and solutions; and next-generation products and services.

The Commission also continues to examine behavioral advertising, the practice of collecting information about consumers’ online habits in order to deliver targeted advertising.⁶ Following a workshop on behavioral advertising last fall, the Commission staff released a set of proposed principles to guide the development of self-regulation in this area and sought comment on these principles.⁷ The deadline for comments was April 11; the Agency received numerous detailed and thorough comments, which it is currently reviewing.

Do Not Call

The Commission continues aggressively to implement and enforce the National Do Not Call Registry. The Commission is grateful that Congress made participation in the Do Not Call Registry permanent so that consumers will continue to enjoy its benefits without having to re-register. In November 2007, the Commission announced six new settlements and one new Federal court action against companies that violated the Do Not Call provisions of the Telemarketing Sales Rule. The six settlements resulted in \$7.7 million in civil penalties for Do Not Call violations.⁸

Privacy and Data Security

Privacy and data security continue to be high priorities for the Commission. In the past 6 months, the Commission announced six new data security cases,⁹ bringing the total number of FTC data security cases to 20. Most recently, the Commission announced cases against TJX and Reed Elsevier, the parent company of Lexis Nexis, alleging that the companies engaged in unfair practices by failing to employ reasonable and appropriate security measures to safeguard sensitive data. The settlements have been accepted for comment, and would require the companies to im-

³CashPro, File No. 072–3203 (Feb. 2008); *American Cash Market, Inc.*, File No. 072–3210 (Feb. 2008); *Anderson Payday Loans*, File No. 072–3212 (Feb. 2008) (all available at <http://www.ftc.gov/opa/2008/02/amerccash.shtm>).

⁴*United States v. LTD Financial Services, Inc.*, Civ. No. H–07–3741 (S.D. Tex. filed Nov. 5, 2007), available at <http://www.ftc.gov/os/caselist/0523012/index.shtm>.

⁵*United States v. Valueclick*, No. CV08–01711 MMM (rzx) (C.D. Cal. filed Mar. 13, 2008), available at <http://www.ftc.gov/os/caselist/0723111/index.shtm>.

⁶See <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.

⁷See Press Release, FTC Staff Proposes Online Behavioral Advertising Privacy Principles (Dec. 20, 2007), available at <http://www.ftc.gov/opa/2007/12/principles.shtm>.

⁸See Press Release, FTC Announces Law Enforcement Crackdown On Do Not Call Violators, Nov. 7, 2007, available at <http://www.ftc.gov/opa/2007/11/dncpress.shtm>.

⁹*United States v. American United Mortgage Company*, No. 07C 7064 (N.D. Ill. filed Dec. 17, 2007), available at <http://www.ftc.gov/opa/2007/12/aumort.shtm>; *Life is good, Inc.*, Docket C–4216 (Apr. 2008), available at <http://www.ftc.gov/os/caselist/0723046/index.shtm>; *In the Matter of Goal Financial, LLC*, Docket No. C–4216 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0723013/index.shtm> (settlement accepted for public comment); *United States v. Valueclick*, No. CV08–01711 MMM (rzx) (C.D. Cal. filed Mar. 13, 2008), available at <http://www.ftc.gov/os/caselist/0723111/index.shtm>; *The TJX Companies*, File No. 072–3055 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0723055/index.shtm> (settlement accepted for public comment); *Reed Elsevier, Inc. and Seisint, Inc.*, File No. 052–3094 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0523094/index.shtm> (settlement accepted for public comment).

plement comprehensive data security programs and third-party assessments biennially for 20 years.¹⁰

The FTC has also been active on data security education. It has distributed more than 3 million copies of its consumer education publication “Take Charge: Fighting Back Against ID Theft.” The FTC also published a guide for businesses on data security, *Protecting Personal Information: A Guide for Business*, and launched an interactive, online video tutorial designed to educate businesses using real-life scenarios. The Agency has also begun to hold regional workshops for businesses on how to plan and manage data security. The first workshop took place April 15 in Chicago.

Green Marketing

In response to a virtual explosion of green marketing over the past year, the Commission has accelerated its review of its environmental marketing guidelines, also known as the Green Guides.¹¹ In November 2007, the FTC published a Federal Register Notice seeking public comment on the Guides. Given the importance of green marketing and the proliferation of new claims, the Commission also announced that it would hold a series of workshops in aid of the Guide review. The Commission hosted the first of these events on January 8, 2008, addressing the marketing of carbon offsets and renewable energy certificates. The second workshop, on green packaging, took place on April 30, 2008, and a third workshop, on green claims related to textiles and building materials, is planned for this July. The Commission will use the information it receives at these workshops to inform its review of the Green Guides, conduct enforcement actions, and educate consumers.

Food Marketing to Children

The Commission continues its efforts to combat childhood obesity. In early August, the Commission issued compulsory process orders to 44 food and beverage companies and quick-service restaurants, asking for information on their expenditures and activities targeted toward children and adolescents. All of the targeted companies have submitted their responses, and staff is analyzing the submissions. Staff will prepare a report, submit it to Congress, and release it publicly this summer. The report will be an important tool for tracking the marketplace’s response to childhood obesity and identifying where more action is needed.

Entertainment Marketing to Children

The Commission continues to monitor the marketing of violent entertainment to children and encourage industry self-regulation in this area. Since 2000, the FTC has issued six reports on the marketing of movies, music, and video games containing content that may not be appropriate for children.¹² The Commission’s reports generally document improvement by all three industries in providing rating or labeling information in advertising. The Commission has also conducted five “undercover shops,” in which underage teenagers try to purchase media rated or labeled as containing inappropriate content. These undercover shops have demonstrated steady improvement in retail enforcement of the age ratings.

Last week, the Commission released the results of its fifth undercover shop. These results show improvement, particularly by the video game industry, which denied sales of Mature-rated games to our underage shoppers 80 percent of the time. This is a dramatic improvement from where the industry started 8 years ago, when nearly 9 out of 10 underage shoppers were able to buy these games. There are, however, still areas for improvement. For example, roughly half of our undercover shoppers were able to purchase R-rated or unrated DVDs and explicit content music. The Commission will continue to monitor self-regulatory efforts in this area.

¹⁰The TJX Companies, File No. 072-3055 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0723055/index.shtm>; In the Matter of *Reed Elsevier, Inc. and Seisint, Inc.*, File No. 052-3094 (Mar. 2008), available at <http://www.ftc.gov/os/caselist/0523094/index.shtm>.

¹¹See Press Release, FTC Reviews Environmental Marketing Guides, Announces Public Meetings (Nov. 26, 2007), available at <http://www.ftc.gov/opa/2007/11/enviro.shtm>.

¹²Moreover, in 2006, the Commission initiated and settled an action against Take-Two Interactive Software, Inc. and Rockstar Games, Inc., the creators and distributors of the popular *Grand Theft Auto: San Andreas* video game, because they advertised the Entertainment Software Rating Board (“ESRB”) rating for the game but failed to disclose that the game discs contained potentially viewable sexually explicit content that was unrated by the ESRB. *Take-Two Interactive Software, Inc.*, No. C-4162 (July 21, 2006), available at <http://www.ftc.gov/os/caselist/0523158/0523158.shtm>.

COMPETITION MISSION

The Commission has an active enforcement agenda to promote and protect competition, focusing on areas that are highly important to consumers, such as health care, energy, real estate, and high technology and standard setting. The Commission scrutinizes mergers in many industries, filing actions to enjoin those that are likely to be anticompetitive and ordering divestitures where appropriate to preserve competition while allowing the beneficial aspects of the merger to proceed. The Commission also polices anticompetitive conduct, with a particular focus on competitor collaboration and exclusionary conduct. Additionally, the Commission promotes sound competition policy through myriad research and reports, studies, hearings, workshops, advocacy filings, and amicus briefs. The Commission is also very active on the international front, developing strong working relationships with foreign antitrust agencies, cooperating on cross-border cases, promoting convergence on competition policies, and offering technical assistance to countries with relatively new competition laws.

This portion of the testimony highlights several important recent developments in the Commission's competition agenda.

Health Care (Pay-For-Delay Settlements and Hospital Mergers)

In the health care area, the Commission is continuing its efforts to prevent brand name drug companies from paying generic competitors to stay out of the market, thereby depriving consumers and other payers of significant savings. In February 2008, the Commission filed a case charging that Cephalon, a pharmaceutical manufacturer, engaged in illegal conduct to prevent competition for its branded drug, Provigil,¹³ by paying four competing firms to refrain from selling generic versions of the drug until 2012.¹⁴ The Commission's complaint alleges that Cephalon's conduct constituted an abuse of monopoly power that is unlawful under Section 5 of the FTC Act. The Commission also has several other exclusion payment ("pay-for-delay settlement") investigations ongoing.

These deals are a growing problem due to two court decisions taking a lenient view of the practice. Between 2000 and 2004, there were no patent settlements in which the generic received compensation and agreed to stay off the market, but after the two court decisions in 2005, there were 3 such agreements in fiscal year 2005 and 14 in fiscal year 2006. The Commission strongly supports legislation to address competitive problems with pay-for-delay settlements. We note that bills have been introduced in both chambers, and thank you, Mr. Chairman, for your sponsorship of the bipartisan Senate bill.¹⁵

Last week the Commission voted to challenge the Inova Health System's proposed acquisition of the Prince William Health System. The proposed merger would combine Inova, the largest hospital system in Northern Virginia, with the Prince William Hospital in Prince William County, Virginia. The Commission alleges that the merger would eliminate the existing, significant price and non-price competition between these hospitals, particularly in the fast-growing western suburbs of Northern Virginia, leading to higher health care costs for the employers and residents of Northern Virginia.

Energy

The Commission shares the concerns of lawmakers, businesses, and American consumers about rapidly increasing prices for crude oil, gasoline,¹⁶ diesel fuel, jet fuel, and natural gas, and currently engages in a wide range of activities to prevent improper industry conduct causing such price rises. Under new authority to promulgate regulations provided in Section 811 of the Energy Independence and Security Act of 2007 (EISA), this month the Commission issued an Advance Notice of Proposed Rulemaking (ANPR) regarding manipulation of wholesale crude oil, gasoline, or petroleum distillate markets. The ANPR, available on the Commission's website and in the Federal Register, solicits public comments on determining whether and

¹³ Provigil is used to treat excessive sleepiness in patients with sleep apnea, narcolepsy, and shift-work sleep disorder.

¹⁴ *FTC v. Cephalon, Inc.*, No. 1:08-cv-00244 (D.D.C. filed Feb. 13, 2008), available at <http://www.ftc.gov/os/caselist/0610182/080213complaint.pdf>.

¹⁵ Preserve Access to Affordable Generics Act, S. 316, 110th Cong. (2007) (as reported by S. Comm. on the Judiciary).

¹⁶ The Commission actively and continuously monitors retail and wholesale prices of gasoline and diesel fuel, looking for "unusual" price movements and then examining whether any such movements might result from anticompetitive conduct that violates Section 5 of the FTC Act. FTC economists have developed a statistical model for identifying such movements. The Agency's economists regularly scrutinize price movements in 20 wholesale regions and approximately 360 retail areas across the country.

in what ways the Commission should develop a rule defining and prohibiting market manipulation in the petroleum industry.¹⁷ The 30-day public comment period runs through June 6, 2008, and the Commission anticipates concluding the rule-making process this year. In addition, Section 812 of that act prohibits knowingly reporting false data to a Federal agency under a mandatory reporting requirement, with the intention of affecting the Agency's data compilations for statistical or analytical purposes. The section provides for Commission enforcement with substantial penalties.

To protect and promote competition in the energy industry, the Commission reviews mergers and investigates pricing and other conduct.¹⁸ Over the past several years, the Commission has challenged many mergers in this industry, obtaining significant divestitures to preserve competition.¹⁹

In the past year, we have acted to block acquisitions in the natural gas and petroleum industries that we believed could raise prices to consumers. In January 2008, Equitable Resources abandoned its proposed acquisition of the Peoples Natural Gas Company, a subsidiary of Dominion Resources, after the Third Circuit took the unusual step of granting the Commission's motion for an injunction pending appeal, and vacated the District Court's ruling dismissing the Commission's complaint.²⁰ The Commission alleged that parties were each others' sole competitors in the distribution of natural gas to non-residential customers in the Pittsburgh area and the transaction would have resulted in a monopoly for many customers. Moreover, in May 2007, the Commission brought an enforcement action in the oil and gasoline industry when it issued an administrative complaint and initiated a Federal court action to block Western Refining, Inc.'s \$1.4 billion proposed acquisition of rival energy company Giant Industries, Inc. The Commission brought the action in an effort to preserve competition in the supply of bulk light petroleum products, including motor gasoline, diesel fuels, and jet fuels, in northern New Mexico. After a week-long trial, the Federal district court denied the Commission's motion for a preliminary injunction.²¹ The Commission is continuing to examine and address a wide range of issues in the energy markets.²²

Real Estate

In another area critical to consumers, the Commission continues to challenge realtor board rules that restrain competition and hinder consumer choice in markets throughout the country. The Commission's cases allege that associations of competing real estate agents have adopted rules that limit competition from non-traditional and discount brokers by restricting these brokers from, in part, placing listings on MLS Internet sites, thus harming consumers who may prefer to list with less expensive or non-traditional brokers. Six of our cases were resolved by consent order requiring each realtor board to discontinue enforcing the policies that, the Commission alleged, kept nontraditional brokers from competing. A seventh investigation led to an administrative complaint against a realtor group, which after a full administrative trial and dismissal of the complaint against the realtors by the ALJ is on appeal before the Commission. Oral arguments were held in April, and

¹⁷ FTC Seeks Public Comment on Rulemaking to Prohibit Market Manipulation in the Petroleum Industry, Press Release, May 1, 2008, available at: <http://www.ftc.gov/opa/2008/05/anpr.shtm>, 73 Fed. Reg. 25614 (May 7, 2008).

¹⁸ In 2005, the Commission settled an enforcement action charging that Unocal deceived the California Air Resources Board ("CARB") in connection with regulatory proceedings to develop the reformulated gasoline standards that CARB adopted. We believe the settlement continues to result in an estimated \$500 million of consumer savings at the pump each year. See the discussion in Section III.D below.

¹⁹ These include Mobil/Exxon, British Petroleum/Amoco, Chevron/Texaco, and Phillips Petroleum/Conoco.

²⁰ See *FTC v. Equitable Resources, Inc.*, No. 07-2499 (3rd Cir. 2008), available at <http://www.ftc.gov/os/caselist/0610140/080204ftcmovacateequitabledecision.pdf>.

²¹ The Commission subsequently dismissed its administrative complaint, concluding that further prosecution would not be in the public interest.

²² For example, in November 2007, the Commission issued its third annual report on the state of ethanol production in the U.S. The report noted that, as of September 2007, 13 firms had entered into the production of ethanol during the preceding year, bringing the total number of U.S. producers to 103. As new firms have entered, the market, which is unconcentrated by any measure of capacity or production, has become even more unconcentrated. 2007 Federal Trade Commission Report of Ethanol Market Concentration (Nov. 2007) available at <http://www.ftc.gov/reports/ethanol/2007ethanol.pdf>.

Additionally, the Commission is preparing its first report for the Committees on Appropriations summarizing the Commission's activities relating to ongoing reviews of mergers, acquisitions, and other transactions in the oil and natural gas industries, the investigation of pricing behavior or any potential anticompetitive actions in those industries, and the resources that the Commission has devoted to such reviews and investigations during the 6-month period.

a Commission opinion is expected in the next months. The Commission also settled an action raising similar concerns with a Milwaukee-based realtor group in the past year.²³

High Technology and Standard Setting

The Commission continues to remain vigilant against mergers and conduct that would distort competition in the high technology industry. One such enforcement case that the Commission has brought is the case against Rambus. In June 2002, the Commission charged Rambus with unlawfully monopolizing four computer memory technologies that were incorporated into industry standards for dynamic random access memory chips, widely used in personal computers, servers, printers, and cameras. In July 2006, the Commission found that Rambus had illegally acquired monopoly power through exclusionary acts, and issued an order limiting the royalty rates Rambus may collect under its licensing agreements.²⁴ On April 22, 2008, the D.C. Circuit Court of Appeals set aside the Commission's Order and remanded the case for further proceedings before the Commission. The Commission is reviewing the Court of Appeals opinion and will decide in the next few weeks whether to appeal the decision to the full D.C. Circuit or the Supreme Court.

The Commission has previously addressed the substantial consumer harm, including higher prices, that can result from the alleged abuse of standard-setting processes. In 2003, the Commission successfully challenged Unocal's alleged illegal acquisition of monopoly power in the technology market for producing Phase 2 "summer-time" gasoline a formulation of low- emissions gasoline mandated for sale and use in California for up to 8 months of the year by misrepresenting that certain information was non-proprietary and in the public domain, while at the same time pursuing patents that would enable it to charge substantial royalties if the information was incorporated into California Air Resources Board ("CARB") standards. The complaint alleged that Unocal induced CARB to adopt standards for this gasoline that substantially overlapped with Unocal's patent rights. The Commission's success is estimated to have saved California consumers over \$500 million per year at the pump.

Other

The Commission's efforts to maintain competition are not limited to high profile industries. In January 2008, the U.S. Court of Appeals for the Fifth Circuit upheld a Commission order requiring Chicago Bridge & Iron Co., N.V. and its United States subsidiary (CB&I) to divest assets acquired from Pitt-Des Moines, Inc. used in the business of designing, engineering, and building field-erected cryogenic storage tanks.²⁵ The Commission had ruled in 2005 that CB&I's acquisition of these assets in 2001, would likely result in a substantial lessening of competition or tend to create a monopoly in four markets for industrial storage tanks in the United States. The court endorsed the Commission's findings that the merged firms controlled over 70 percent of the market, and that new entry was unlikely given the high entry barriers and based on the incumbents' reputation and control of skilled crews.

The Commission continues to appeal its case against Whole Foods Market, Inc.'s acquisition of its chief rival, Wild Oats Markets, Inc., on the grounds that the district court failed to apply the proper legal standard that governs preliminary injunction applications by the Commission in Section 7 cases. The Court of Appeals for the District of Columbia Circuit heard oral arguments on this case on April 23, 2008.

NEEDED RESOURCES FOR FISCAL YEAR 2009

To meet the challenges of its Consumer Protection and Maintaining Competition goals in fiscal year 2009, the FTC requests \$256,200,000 and 1,102 FTE. The fiscal year 2009 request represents an increase of \$12,336,000 and 18 FTE over the fiscal year 2008 enacted levels.

The Commission seeks these additional resources to continue to build on its record of accomplishments in enhancing consumer protection and protecting competition in the United States and, increasingly, abroad. The increase of \$12,336,000 that the Commission is seeking in fiscal year 2009 includes:

²³ Press Release, FTC Charges Milwaukee MLS with Illegally Restraining Competition (Dec. 12, 2007), available at <http://www.ftc.gov/opa/2007/12/mls.shtm>.

²⁴ Press Release, FTC Issues Final Opinion and Order in Rambus Matter (Feb. 5, 2007), available at <http://www.ftc.gov/opa/2007/02/070502rambus.htm>.

²⁵ *FTC v. Chicago Bridge & Iron Co.*, No. 05-60192 (5th Cir. 2008) available at <http://www.ftc.gov/os/adjpro/d9300/080125opinion.pdf>. <http://www.ftc.gov/opa/2008/01/cbi.shtm>

- \$7,989,000 in mandatory cost increases associated with contract expenses (CPI adjustment) and personnel (salaries and with-in-grade increases);
- \$2,847,000 for 18 additional FTE;
- 10 FTE for Consumer Protection to protect consumers from unfair and deceptive practices in the financial services marketplace; protect consumers' privacy; improve compliance with FTC orders; pursue foreign-located evidence of fraud perpetrated against U.S. consumers; advocate the adoption of foreign data privacy laws and procedures that are compatible with American law; and provide support for the effective operation of this program; and
- 8 FTE for Maintaining Competition to meet the increased workload required to challenge anticompetitive mergers and assure that the marketplace is free from anticompetitive business practices in the health care, pharmaceutical, energy, and technology sectors; promote convergence in competition policy of foreign enforcement practices; and provide support for the effective operation of this program;
- \$1,500,000 for non-FTE program needs;
- \$1,100,000 for Consumer Protection;
- \$500,000 for "Green" marketing research, education campaign, and enforcement;
- \$250,000 for high-tech tools to stop fraudsters;
- \$250,000 for marketing and advertising of food to children;
- \$100,000 for privacy and identity theft and deceptive and unfair practices in mobile marketing; and
- \$400,000 for Maintaining Competition to meet the challenges of an increased enforcement agenda and associated litigation and outreach efforts.

The majority of the funding for the FTC's fiscal year 2009 budget request will be derived from offsetting collections; HSR filing fees and Do Not Call fees will provide the Agency with an estimated \$189,800,000 in fiscal year 2009. The FTC anticipates that the remaining funding needed for the Agency's operations will be through a direct appropriation of \$66,400,000 from the General Fund in the U.S. Treasury. The FTC appreciates the strong support it has received from Congress to serve its critical mission of protecting the American consumer and ensuring competition in the marketplace. With the increased funding made available to the FTC in the fiscal year 2008 appropriation for high priority activities including subprime lending, identity theft, the U.S. SAFE WEB Act, market manipulation of petroleum, maintaining competition, and training and technical assistance for developing nations, the FTC will be able to address critical consumer problems at present and anticipate, adapt, and mitigate the challenges of the future.

CONCLUSION

We appreciate the opportunity to appear before you today to discuss the Commission's work and our fiscal year 2009 budget request, and look forward to continuing to work together.

Senator DURBIN. Commissioner Leibowitz.

SUMMARY STATEMENT OF HON. JON LEIBOWITZ

Mr. LEIBOWITZ. Thank you, Mr. Chairman, Ranking Member Brownback. Let me begin by speaking briefly about the Commission generally before I turn to the FTC's consumer protection efforts.

From my perspective, the Commission's biggest challenge is that we are a small agency—we have fewer than 1,100 full-time equivalents (FTEs)—but we are tasked with a big mission: protecting competition and consumers across broad swaths of the economy. The constant challenge for us is not only to effectively leverage our limited resources—I think we do that quite well—but also to ensure that the quality of our work is not strained by the quantity of demands placed upon us.

In the past few years, Congress has enacted new laws, several very important ones, that the FTC is charged with enforcing: CAN-SPAM, the Fair and Accurate Credit Transactions Act (FACT), the

Children's Online Privacy Protection Act (COPPA), to name just a few.

Put simply, implementing and enforcing these laws takes resources. For that reason, we deeply appreciate your efforts to ensure that we have the budget we need. Speaking for myself, I am enormously grateful for the \$3 million your subcommittee authorized last year above the administration's request. That enabled us to hire additional employees to bolster our enforcement efforts, especially in the areas of financial fraud and anticompetitive behavior by pharmaceutical companies, which Chairman Kovacic talked about.

Mr. Chairman, the rest of my remarks will focus on some of our consumer protection priorities. I am going to try to do six priorities in 3 minutes.

First, financial services. Chairman Durbin, you mentioned mortgages, and we currently have multiple investigations underway in the subprime market, including two that the targets themselves have made public: investigations of Bear Stearns, for servicing subprime mortgage loans; and of CompuCredit, a leading provider of subprime credit cards. We also are investigating mortgage brokers whose advertising, for example, touted preposterously low interest rates without disclosing that they would increase substantially after a short introductory period. In the past decade, we have brought 22 actions against the mortgage lending industry and obtained more than \$320 million in consumer redress.

Indeed, if you combine all the consumer redress, disgorgement, and fines we collect with our Hart-Scott-Rodino and Do Not Call fees, the agency brings back more money to American consumers than it costs.

Second, Do Not Call. The great American philosopher, Dave Barry, has called the Do Not Call Registry the most popular Government program since the Elvis stamp. It has helped preserve the sanctity of the American dinner hour, and we are grateful that Congress made Do Not Call permanent last year. There are nearly 160 million phone numbers registered on Do Not Call and—

Mr. KOVACIC. How many?

Mr. LEIBOWITZ. 160 million registered, and to date we have brought 36 cases against violators.

Third, technology. The Commission has initiated more than 100 spam and spyware actions, and has helped to substantially reduce the nuisance adware problems that have caused literally billions of unwanted pop-up ads on Americans' computers.

We have also held hearings on emerging technologies and practices such as behavioral marketing; that is, the monitoring of consumers' online behavior to deliver targeted advertising. Commission staff recently issued a set of proposed behavioral advertising principles for public comment designed to push self-regulation in the right direction.

Fourth, privacy and data security. Safeguarding consumers' sensitive personal information remains a priority for us. To date, the FTC has brought 20 enforcement actions challenging data breaches and inadequate data security practices.

Fifth, so-called green claims. In the past year or two, there has been an explosion of environmental advertising claims like "sus-

tainable”, “renewable”, and “carbon neutral”. In response, we are holding a series of workshops and updating our environmental marketing guidelines, better known as the Green Guides.

Sixth and finally, an issue I know both of you are interested in, marketing to children. The Commission continues its efforts to combat childhood obesity and foster appropriate food marketing to kids. Last August, the Commission subpoenaed 44 food and beverage companies seeking information on their activities targeted to children. Staff is preparing a report based on what we have learned, and we expect to release it this summer.

The Commission also continues to monitor entertainment industry marketing practices. Since 2000, the FTC has issued six reports on the marketing of movies, music, and video games containing violent content. And last week we released the results of our fifth undercover shopping survey in which underage teenagers tried to buy media labeled as containing inappropriate content. These reports and surveys generally show industry improvement, although further progress would be helpful, especially in the growing marketing of unrated DVDs. Our efforts are designed to encourage further self-regulation in this area. We believe they have been helpful.

With that, I will exercise some self-regulation of my own and stop talking. And I am happy to answer questions.

Senator DURBIN. Thank you, and I think we will have a few.

TRENDS IN THE OIL MARKET

Chairman Kovacic, I wrote you a letter on April 23 urging the FTC to investigate trends in the oil market. We have seen a sudden widening of the difference between crude oil and certain refined petroleum product prices, the so-called crack spread. This crack spread for middle distillate fuels like diesel, home heating oil, and jet fuel has spiked recently, leading to two trends I wrote you about.

First, while gasoline has typically been more expensive than diesel fuel, we have recently seen that trend dramatically reversed. The national average for retail gas, \$3.72; the average for diesel fuel, \$4.33 a gallon, a difference of 61 cents.

Second, we are seeing a spike in jet fuel costs having a major impact on struggling airlines. Yesterday CNN quoted the CEO of a consumer airline ticket web site as expecting “at least two more price increases before the end of May.”

These trends are not linked to changes in crude oil prices or taxes. The crude feedstock for diesel and gasoline is identical, about \$3 a gallon, and Federal gas and diesel taxes have not changed for almost 15 years.

I would like to just make a comment. First, I do not think these charts are inconsistent. What Senator Brownback has shown us is that as crude oil prices have gone up, so too has the cost of the refined product, in this case I believe gasoline. I do not quarrel with that.

But this one tells you that the difference between the two is much wider than it once was, and that difference is the refining add-on cost to the basic crude product. And within that add-on cost for refining, the so-called crack spread, turns out to be a world of profit for the oil companies now registering and reporting not only

record oil company profits, but record profits for American businesses. No one has ever been quite this successful in our capital system.

So the question I have is this. Has the FTC been monitoring these trends? Do you plan to initiate a comprehensive investigation or inquiry? And what is driving this?

Mr. KOVACIC. Thank you, indeed, for your letter, Chairman Durbin.

For about the past 3 or 4 years, we have had a program in place to monitor on a retail and wholesale basis price changes concerning gasoline and diesel. The program has not covered jet fuel as well. But we have been examining anomalies as they appear in the pricing and distribution of these products. With your letter in hand, we are expanding our examination of these issues and we are taking a look very closely at both trends in diesel and jet fuel.

I do not have specific results to report to you at the moment, although I do make the offer to meet with you and with my staff as we do learn more from the results of this examination, and I make myself, along with my staff, available to discuss this with you.

What we are seeing in part is that this is an international pattern. That is, from our quick examination to date, these are trends that characterize practice in global markets, Singapore, Europe.

We are also noticing that one notable feature has been a dramatic increase in demand for diesel in recent years. That is, in Europe, in Asia, in a number of areas where we have been able to examine very closely and compare with our own experience, there has been a significant increase in the demand for diesel. We see that as one factor that has probably made the two lines cross that you were referring to before.

Another relationship we are looking at quite carefully is that in the stratum of the refining process, the barrel that is being produced—there is a very close interaction between production capacity and the production of both jet fuel and diesel, kerosene and diesel together. We are looking very carefully at how adjustments in production process and capacity allocation decisions have affected that.

But let me emphasize that your inquiry and others that we have received from your colleagues in this body and across the Capitol—we are looking at this very carefully. I make myself at your disposal to report to you on what we see as the consequence of this deeper look at both diesel and jet fuel.

Senator DURBIN. Thank you. I am glad that the FTC is going to initiate this inquiry, and I am sure it will expand even beyond the questions that I have asked. I hope that it will include questions about refinery capacity and unused capacity. I find it hard to imagine why we are still dealing with about 85 percent use of refinery capacity in a country where the prices are so high.

Second, I hope you will at least explore the question as to whether and, if so, how much the United States is exporting in terms of refined product or even crude product for that matter. There have been calls for us to drill in the Arctic National Wildlife Refuge and other places offshore that are controversial from an environmental viewpoint, and I certainly hope that before we would even consider such a thing, that we would look at other alternatives that would

spare these areas from creating any kind of environmental hardship.

Let me turn it over to my colleague and I will return with some more questions.

Senator BROWNBACK. Thank you, Mr. Chairman.

Examining the data, I think we are using similar charts. It looks like the crack spread has flipped between 2007 to 2008. I have somebody who understands and analyzes this more, but if you look at what has happened on the spot oil price, this chart goes from 2001 to 2008. Yours goes from 2002 to 2007. There has been substantial movement. But I would just point out over a longer period of time, these two track together and you are going to see an increase in gasoline prices.

If there has been market manipulation, I want us to absolutely go after people with hammer and tong on it so that we can get at the bottom of this.

I understand the FTC has recently announced an advance notice of proposed rulemaking on market manipulation of oil and gas prices. How do you see this rule helping the American consumer? What are you targeting? And I know you cannot talk on some of the specifics of this from our previous discussion, but can you give us any thought of what the American consumer can see out of the FTC as a result of this?

Mr. KOVACIC. What I am going to do, Senator, is to give you a snapshot of what was in that notice as an indication of what we will be looking at and, as you mentioned, to be enormously cautious in offering any specific views about what we might do to avoid a possibility of prejudgment.

We intend to examine very carefully a variety of scenarios that are laid out in the advance notice. Among the scenarios for which we have sought comment involves the possibility that there has been fraud with respect to the reporting of information to public authorities, or fraud or misrepresentation with respect to the reporting of information to private bodies that collect and report information on pricing and transactions.

We intend to look very carefully at a collection of scenarios that are closely related to those that our other Federal agencies, the Federal Communication Commission (FCC), Federal Energy Regulatory Commission (FERC), and Commodity Futures Trading Commission (CFTC) have examined in the course of applying manipulation authority. Have there been deliberate efforts in specific instances to exploit shortage conditions as an opportunity to raise prices? Have there been traditional forms of manipulation that would fit within a conventional antitrust or competition context, that is, including the possibility of collusion, improper behavior to exclude other firms?

As laid out in the notice, this range of possibilities, some of them familiar to the concepts that you were alluding to before, Senator, involving outright collusion, traditional antitrust actionable behavior, but not antitrust behavior in many instances examined by our fellow Federal agencies in different settings. Those are the scenarios in the notice that we have asked others to comment upon, and we do welcome the comments before the comment period closes in early June.

Mr. LEIBOWITZ. Yes. And let me just echo what the Chairman has said. We put out, I think, a 38-page advance notice of proposed rulemaking. I think that is the right approach to take because, after all, we have a lot of experience with antitrust, but we do not have a lot of experience with manipulation beyond the antitrust laws.

And in the ANPR—and again, I do not want to talk in too much detail because we do not want to be accused of prejudging; we do not want to be asked to be recused—we show other examples, examples that we want commented on, like very public announcements or pre-announcements of refinery shutdowns, or moving product away from an area where there is a shortage to drive up prices. And so those are the things we want comments on, and we are committed to, I think, completing—we certainly anticipate completing the rulemaking process by the end of the year.

Senator BROWNBACK. Good. I think that is good and I think it is going to be very useful to be able to see that kind of information. As you may know from last week's hearing, we had the CFTC here, and we were talking about market manipulation by large hedge funds, index funds on commodity prices overall. And I think there is more to be looked at there.

FOOD MARKETING TO CHILDREN

On another area, Senator Harkin and I have been working closely together over the last year examining the effects of food marketing to kids. I am very interested in the comprehensive analysis the FTC has undertaken on the types and amounts of food marketing directed at children. It is my understanding the report is due to be released this summer. You have worked on these topics. I have worked with you on these topics before, as you mentioned, Mr. Leibowitz, and on target marketing of violent entertainment to children.

What kind of information should we expect to see in this report that you are going to be putting out on target marketing of food to children?

Mr. KOVACIC. Jon?

Mr. LEIBOWITZ. Well, we hope to complete our report this summer. We did a workshop on this issue. We sent out a number of subpoenas to the major fast food restaurants and food companies.

Maybe we can come in and brief your staff about this. But we are trying to figure out exactly how the targeting is being done and what effect it may have on children. And as you know, because I know you are involved in the FCC task force, childhood obesity has gone up dramatically in the last generation. What used to be called adult-onset diabetes cannot be called that anymore because so many children have it. We think part of that may be due to the foods that they are eating, and so we are taking a look at this marketing and we hope to have something useful to say in the report in the next couple of months. But we will come in and talk to you about it beforehand.

Mr. KOVACIC. I think, Senator, what you certainly can expect to see is what probably will be the best empirical view that a public agency has had to date about some of the phenomena that are being addressed. We are undertaking a very careful effort to gather

data company by company to give you and the larger public a clear view of the advertising trends at issue. This study will be based, again related to a point that both of you made before, as much as possible, on a carefully developed empirical foundation and not simply on hunches.

Senator BROWNBACK. Thank you.

SPECULATION IN THE OIL MARKET

Senator DURBIN. Chairman Kovacic, last week the Wall Street Journal's Market Watch quoted an industry analyst as estimating that about \$25 to \$30 of price per barrel of crude oil may be attributed solely to speculation. Have you looked into how the futures market is influencing the price of gasoline or other energy products? And if so, what steps do you think should be taken to protect consumers from any excessive speculation?

Mr. KOVACIC. To this point, we have not examined that in a detailed way, Mr. Chairman. What we have seen from our work in the past, looking at the links between futures trading activity and current prices, is that efforts on the part of individual investors to anticipate future developments and make investments unmistakably play some role in setting current prices. What we are not certain of is how much. That is, is it, in the case of the individual quoted in the article, \$25 or \$30 a barrel? Is it \$5 or \$10 a barrel? Is it \$1 a barrel? That is something we do not know.

I would anticipate pursuing two avenues on this issue. One is in the course of the rulemaking process; one possible avenue identified in the advance notice is to devote closer attention as part of the authority. That is, one possible application of our authority might be to examine these issues in much closer detail.

A second one that I detect in your questioning of Walt Lukken from the CFTC and to some extent with Chris Cox is a concern that whatever we do, we make the best possible use of knowledge that already resides in other public authorities that have been examining this. So in addition to our consultation with them as part of the rulemaking process, we are separately going to work as carefully as possible with the CFTC, with the SEC, and indeed, with FERC, though they do not deal with petroleum prices as such, to see the extent to which we can explore these issues together and to make sure that as our own research program is formulated and, as an enforcement program is developed, that we take the fullest possible advantage of what they have learned. I have met with Chairman Lukken on this point. I have met with Chairman Kelleher, and I anticipate meeting with Chairman Cox as well to ensure that whatever we do builds on the foundation they have already constructed.

Senator DURBIN. It is no secret that Chicago, which I represent, is very interested in the futures markets.

Mr. KOVACIC. There are futures markets in Chicago, yes.

Senator DURBIN. So I am trying my best to look at this in an honest fashion, and when I ask the industry, they say do not forget we are one player, and there are other markets that people can choose to use outside of the United States. And if we take action in the hopes of having impact on speculation, it may just drive the

futures activities to other countries. I assume that will be taken into consideration?

Mr. KOVACIC. Indeed. As a consequence of the augmentation of resources that you provided us last year for international matters, we have a much better platform today than we did 2 years ago to work with our foreign counterparts. I suspect it would surprise neither of you that the issue of energy prices, both with respect to current prices and futures markets, is an acute matter of concern to our counterparts at the Office of Fair Trading in London, to our counterparts in the Bundeskartellamt in Bonn, to our counterparts at the ACCC in Canberra, and to Canada's Competition Bureau in Ottawa. There is no issue, I would suspect, that is more important or compelling to all of us.

And we do have increasingly effective means to cooperate with each other. So the international dimension of this problem will be a crucial element of what we do. Again, by way of thanking you for looking over the horizon to think of the kinds of resources that provide a better basis for us for doing that work and taking that into account, we are in a much better position to do that now than we were previously.

Mr. LEIBOWITZ. Yes. And if I can just add, I agree with everything that the Chairman just said, and we are also going to be reaching out in the rulemaking process to buyers, to customers, and to consumer groups because we really need to learn about this area as we go forward with our manipulation authority.

DO NOT CALL

Senator DURBIN. Commissioner Leibowitz, you mentioned the Do Not Call Registry that Dave Barry had just kind things to say in reference to. And it is my understanding that there are now some 145 million active telephone number registrations in our country, maybe even higher.

Mr. LEIBOWITZ. It is up to 160 million now. It grows every day.

Senator DURBIN. I also understand the FTC has received over 1.2 million consumer complaints alleging violations of the registry. How are you responding? What remedies or relief do you have available when you find violations?

Mr. LEIBOWITZ. Well, that is a really good question. We do collect complaints and that is how we prioritize, in a large way, the law enforcement actions that we take. We have actually brought 36 cases against violators thus far. I think last year, we recovered \$7.7 million in fines.

We are fortunate that when we have violations of Do Not Call, we are able to fine malefactors. For most violations of the FTC Act, however, we do not have fining authority. That is an issue that is being discussed in the context of the reauthorization that is going through the Commerce Committee.

But we take Do Not Call very, very seriously. We think it is a wonderful program and an unequivocally successful one, and we spend a lot of resources to make sure that we go after people who are in violation of it.

Senator DURBIN. Thank you.

Senator Brownback.

MARKETING ADULT-RATED ENTERTAINMENT TO CHILDREN

Senator BROWNBACK. Gentlemen, I want to look at the FTC study that previously done on target marketing of adult-rated entertainment material for children. I appreciate you handing me your FTC press release about undercover shoppers finding it more difficult to buy "M" rated games.

You may recall some of the ground-breaking studies and work that were done as the Commerce Committee was pushing on this issue. Mr. Leibowitz, you were working with Herb Kohl. I have worked on it with Senator Lieberman. John McCain was chairing the Commerce Committee when we moved into this area.

Are you looking still at the target marketing of the adult material? This is on the ability to purchase, but not the target marketing of this.

I want to suggest that what you studied in the target marketing of entertainment to underage consumers may be the way you want to study the comparable target marketing of material in the food consumption area. Are you updating the target marketing survey on the entertainment material?

Mr. LEIBOWITZ. Yes. We will be doing another report. We have done six in the last 8 years, I believe, and so we will be doing another entertainment industry marketing report probably sometime toward the end of this year or next year.

And we do look at targeted marketing. In the context of our food marketing to children report, we will be looking at, for example, Internet advertising to kids and the propriety of it and the types of advertising we are seeing. I think in our last report on entertainment industry marketing, we saw that ratings were not as well associated with Internet advertising as they were with, for example, print advertising.

Senator BROWNBACK. I think this is a key area for us. You have correctly identified that we are all seeing this huge onslaught on obesity, particularly in children. We are looking at a possibility of a generation that may not live as long as their parents did and this would be a first for this country, a lot of the problem is just based upon a lack of healthy eating habits.

We are seeing target marketing taking place here, which we saw in the entertainment industry. You guys doing that survey and putting the information out was something that was very helpful to the Congress, and I think it would be very helpful to the country to expose the problem of target marketing of food to children, if it is what is taking place here. This is why it is so hard for mom or dad to go for the Healthy Choice when they are taking the kids to the grocery store or to the fast food restaurant. And the kids say no, as they pull back the other way. We can try to help the parents in that situation. I think it would be very beneficial.

Might I make a suggestion to both of you? I have recently met with the head of the National Institute of Mental Health. The understanding of how the mind works is getting much better. Now, we are a long ways from understanding the most complex physical entity in the entire cosmos. It is the human mind. And then there is a subset of that, the child's mind, even maybe more difficult to understand.

Mr. LEIBOWITZ. And I have two young children, so I know exactly what you are talking about.

Senator BROWNBACK. And it is not fully developed until—I think they are saying now—the age of 23 on average.

But I found it very interesting what we do know. By meeting with them, I might suggest that you bring out some of the experts from the National Institute of Mental Health or you yourself go there and have them tell you what do we know and what do we not know because I think you will find it interesting to your own perspective about regulating advertising or looking at advertising. To ask the question of what is really happening within this mind, and what do we know and what do we not know, what are we unlikely to know. I think it would be advantageous.

One quick final comment. I hope when you do the gasoline study, which I think can be very helpful, you will look at overall supply and demand situations globally and the effects of transportation because in any sort of global commodity business is effected by supply and demand. The big differential is transportation cost of that commodity. While we may have disputes about domestic production of oil, it does have a significant impact and a more pronounced impact domestically. And I hope you would look into this.

I do not want anything left off the table on this as we look at this very key area and an area of deep concern to us and to the country. I think you guys can provide some overall data to use in this tough time of increasing energy costs.

Mr. KOVACIC. Senator, your comment about the consultation with the authorities at the National Institute of Mental Health fits very well into an approach that we have taken to heart on consultations with others. Indeed, one line of research that we have been spending more time on is the larger question about how people absorb information, what do they understand, adults and children, from the downpour of information that swamps each of us every day. When they see a mandated disclosure, what do they take away from it? We had a very good workshop on what is called behavioral economics, which really goes to this question in many ways, of how people understand images or messages that are being brought to them. So that fits very well—your thought about how to approach that—with other things we are doing, and I will certainly bring that back to my colleagues.

On the point about energy, I think it is our responsibility within the sphere of work we do to be as active and effective as we possibly can. And we cannot possibly shed responsibility by saying the problem lies elsewhere. In the full scope of authority we have, our principal duty is to use that authority as effectively as we possibly can.

I think another part of our responsibility that you have touched on—and I think it is really implicit in larger discussion we have had—is our obligation to participate in larger discussions about what energy policy should be, larger discussions about how we live from what we see in our consumer protection and competition side, how we consume, how our lives are structured in a way that drives demand in certain directions, how people can make adjustments from existing lifestyles in ways that could affect consumption pat-

terns, and indeed, on the supply side, what challenges we face in ensuring that there are adequate supplies.

And I think beyond the narrow niche of competition and consumer protection, as important as those are to both of us, we would like to be part of that larger discussion about looking ahead as a country, what bigger challenges we must face in order to resolve these and related problems. We would eagerly enjoy being part of that discussion as well.

Senator BROWNBACK. Thank you, Mr. Chairman.

CREDIT CARD PRACTICES

Senator DURBIN. So you identified one of your concerns with financial services as subprime lenders and the like. I would like to ask you whether you have initiated any kind of inquiries or investigation into credit card practices.

Mr. LEIBOWITZ. Credit card practices are tricky for us because they are mostly done through banks, and we do not have jurisdiction over banks. It is one of the carve-outs, like common carriers and insurers, that we do not have jurisdiction over.

We do have a major investigation going on of a large subprime credit card non-bank company, CompuCredit, and I can make that public because they have made it public in, I think, their Securities and Exchange Commission (SEC) filings. So yes. The answer is yes. We are looking at this.

Senator DURBIN. I would think that the credit card aspect of this might come up in the identity theft investigations.

Mr. LEIBOWITZ. Of course, it does.

IDENTITY THEFT

Senator DURBIN. And that is your number one complaint. I think one out of three consumer complaints relate to identity theft.

Mr. LEIBOWITZ. That is right.

Senator DURBIN. Having been personally victimized a few years ago and my wife just recently—thank goodness, it was not any great damage to us. Tell me what you are finding. Are there things that we should be considering in terms of new legislation or new policies that might protect the privacy of American consumers?

Mr. LEIBOWITZ. Well, identity theft is a very major problem in America. Roughly 10 million people, according to our surveys, are victims of some sort of identity theft every year.

We are mostly an information clearinghouse on identity theft because, after all, a lot of identity theft is criminal. But we do a lot of education on this, and we have some identity theft brochures, and I believe 3 million people have copies of them.

Do I think that there is a need for more legislation? I would like to think about that and get back to you.

But I certainly think it is an area—and I think our staff certainly thinks it is an area—that we need to keep in the forefront because it affects so many Americans. And so we spend a lot of time on the education side, on the compiling of statistics side, and we are going to stay on top of it.

Mr. KOVACIC. I want to underscore Commissioner Leibowitz's observation about the importance of your support for our efforts to do education. This is an area where we think that with greater pre-

caution-taking, many Americans can avoid circumstances in which they are going to be vulnerable. We should begin the process of education at the earliest possible stages of our education system. That is, imagine building into grade school education equivalence of the precepts that I think many of us—well, of a certain age at least—tended to learn as school children. Do not take a ride home with a stranger. If someone approaches you that you do not know, you do not follow them around. Basic precepts that might be identified for an electronic age today. If it is someone you do not know that is reaching out to you, far more often than not, nothing good is going to come from that. To tell adults about how to be discreet in the way in which they disclose information about themselves. If you receive a telephone solicitation—we will assume it is a legitimate one seemingly—or if you receive solicitations over the Internet and you know that you do not have a bank account with the State National Bank and they are asking you to verify account information, that is certain to be a fraud.

So your continuing support for efforts both for us and for related public institutions to carry on that education function would be helpful, along with your support for our continuing efforts to work more extensively with other public institutions.

As my colleague mentioned, the serious wrongdoers I think will only be deterred in this area when we take their freedom away. That means prison sentences. That means criminal prosecution. And your encouragement and continuing assistance in our efforts to prepare matters for prosecution by the Department of Justice, by State prosecutors, by Assistant U.S. attorneys would be most valuable in this respect.

Mr. LEIBOWITZ. And I absolutely agree with that.

GREEN MARKETING

Senator DURBIN. If I could just have one last question, I think there is one area we have not touched on in the consumer side, and that is the so-called green marketing that you mentioned in your summary.

The FTC has been working to review environmental marketing guidelines, also known as Green Guides. What is the most common type of problem that you are finding when it comes to green advertising?

Mr. LEIBOWITZ. Well, what we are beginning to see with the proliferation of green advertising—of course, if it is accurate, that is very good. It is good for the environment, and it is good for consumers to have that option. What we are beginning to see—and we started this with a workshop process—is that some of the advertisements are sometimes exaggerated, and if an advertisement is deceptive, then we are going to do an investigation and perhaps bring a prosecution. We are just starting to look at this issue. We think most of the advertisements we are seeing are good and they are well-intended, but we are going to police this area. That is what we are supposed to be doing.

Mr. KOVACIC. If I can mention, Mr. Chairman, our recent workshop on packaging and green claims related to packaging I think underscored an issue that lies ahead which is in popular discourse in advertising you see common use of terms like “sustainable,”

“green,” “green-friendly.” I suppose in some way we have a general hunch about what these things mean, but there could be a source of confusion for consumers as a whole. What is a sustainable product?

Senator BROWNBACK. Or what does ecoshaped mean? A very handsome shape, too.

Mr. KOVACIC. That is right.

And one of the things we saw in our workshop was—I think our workshop will help be a catalyst for further efforts by a variety of private and not-for-profit associations to provide better definitions for these things, to help establish standards and focal points for providing meaningful definitions. That, in turn, is going to assist us in framing the revision of our guidelines themselves. And as my colleague mentioned, we are keenly attuned to instances in which someone says, give me \$50, I will plant a tree in the rainforest, to focus more and more attentively on whether that tree gets planted.

Senator DURBIN. Thank you.

Senator Brownback.

Senator BROWNBACK. I have no further questions.

Senator DURBIN. Thank you. It has been a great hearing. You have a fascinating agency which has received high marks for its performance for America’s taxpayers and our economy, and you should be proud to be part of it. And we are glad to have you as part of our appropriation. I thank you for your preparation for this hearing and your comments.

ADDITIONAL COMMITTEE QUESTIONS

We may send some written questions your way, and I hope you will have a chance to respond to them in a careful and expedient way. The hearing record is going to remain open for about 1 week until Wednesday, May 21, for other subcommittee members if they would care to submit questions as well.

[The following questions were not asked at the hearing, but were submitted to the Commission for response subsequent to the hearing:]

QUESTIONS SUBMITTED BY SENATOR RICHARD J. DURBIN

MERGER ACTIVITY

Question. During economic downturns like we’re experiencing today, analysts have reported that merger activity tends to increase.

Has the FTC observed that trend in the past, and if so, does the fiscal year 2009 budget include an increase to accommodate the increase in anticipated workload?

Answer. The FTC’s data show that the number of merger filings with the FTC and the Department of Justice tends to grow with increased merger and acquisition activity during strong economic times. The FTC has not observed that merger notifications tend to increase during economic downturns. Notwithstanding the current economic downturn, however, the FTC budget request for fiscal year 2009 includes an increase in resources devoted to reviewing mergers—resources that will be used to address the growing complexity of the transactions that the agency reviews and the increased need for sophisticated economic analysis of those transactions.

FRAUD COMPLAINTS

Question. The number of fraud complaints reported to the FTC grew by almost 30 percent in 2007.

What was the cause of the increase, and how will the fiscal year 2009 request address this problem?

Answer. This increase is due, in large part, to better data collection and specifically due to a substantial increase in complaints shared by the Better Business Bureaus ("BBBs"). We received 169,887 complaints from the BBBs in 2007, compared to 20,265 complaints in 2006.

The FTC maintains a broad range of consumer complaint data in Consumer Sentinel, which is a secure online database of millions of complaints that we make available to more than 1,700 law enforcement agencies. Numerous consumers complain directly to the FTC. At the same time, for many years, the agency has undertaken significant efforts to obtain complaints from other law enforcers combating fraud, such as the FBI, U.S. Postal Inspection Service, National Association of Attorneys General, and Australian Competition and Consumer Commission, as well as non-governmental entities, such as the BBBs. Pooling consumer complaint data from multiple sources enhances their utility for law enforcement, that is, bringing cases, and related purposes. For this reason, each year we strive to encourage new entities to share data with us and to increase the amount of data shared by existing contributors.

During fiscal year 2009, we will continue our efforts to increase complaint data sharing from our partners and, through outreach, encourage consumers to complain directly to the FTC. Our fiscal year 2009 budget request provides funds to support these important efforts.

SUBPRIME LENDING

Question. The FTC's fiscal year 2009 budget request includes an increase for protecting consumers from unfair and deceptive practices in the financial services marketplace.

What tools does the FTC have to investigate predatory lending practices? What specific steps has the FTC taken in the past year?

Answer. The FTC has effective tools for investigating lending practices that might violate any of the laws it enforces, which include the Truth in Lending Act ("TILA"),¹ the Home Ownership and Equity Protection Act ("HOEPA"),² and the Equal Credit Opportunity Act.³ The Commission also enforces Section 5 of the Federal Trade Commission Act ("FTC Act"), which more generally prohibits unfair or deceptive acts or practices in the marketplace.⁴ The FTC has jurisdiction over nonbank financial companies, including nonbank mortgage companies, mortgage brokers, and finance companies.

The full range of investigative tools available to the Commission in its other consumer protection investigations are available in its lending investigations. Most significantly, the FTC has the authority under Section 20 of the Federal Trade Commission Act to issue civil investigative demands to compel the recipient to provide documents, testimony, and other information to be used in determining whether the law has been violated and whether to commence a law enforcement action.

The Commission has been very active in investigating mortgage lending practices in the past year.⁵ Among other things, in June 2007, the agency staff conducted a nationwide review of ads, including some in Spanish, featuring claims for very low rates or monthly payment amounts without adequate disclosure of other important loan terms. The FTC staff reviewed the ads to determine whether they may be deceptive in violation of Section 5 of the FTC Act or may violate TILA.⁶ The Commission staff then commenced investigations of or sent warning letters to advertisers whose ads raised concerns. This included warning letters that FTC staff sent in September 2007 to more than 200 mortgage brokers and lenders, and media outlets that carry their advertisements for home mortgages, informing them that their ads may be unlawful. The agency staff recently reviewed the current advertising of those who received warning letters. We will take law enforcement action where ap-

¹ 15 U.S.C. §§ 1601–1666j (requiring disclosures and establishing other requirements in connection with consumer credit transactions).

² 15 U.S.C. § 1639 (providing additional protections for consumers who enter into certain high-cost refinancing mortgage loans). HOEPA is a part of TILA.

³ 15 U.S.C. §§ 1691–1691f (prohibiting creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, and the exercise of certain legal rights).

⁴ 15 U.S.C. § 45(a).

⁵ The Commission's April 29, 2008 testimony before the Subcommittee On Interstate Commerce, Trade, and Tourism of the Committee On Commerce, Science, and Transportation, United States Senate provides a comprehensive description of the FTC's law enforcement, policy, and consumer education work in the subprime mortgage market in recent years. The testimony is available at <http://www.ftc.gov/os/testimony/P064814subprimelending.pdf>.

⁶ See Press Release, FTC Warns Mortgage Advertisers and Media That Ads May Be Deceptive (Sept. 11, 2007), available at www.ftc.gov/opa/2007/09/mortsurf.shtm.

propriate if this review or other monitoring of mortgage advertising claims reveals that an advertiser has violated the law.

In addition, the FTC plays an important role in preventing unlawful mortgage discrimination.⁷ At this time, the Commission is conducting several non-public investigations of mortgage originators for possible violations of fair lending laws.

The Commission has also been active in investigating unfair or deceptive practices by mortgage servicers. Recently, The Bear Stearns Companies, Inc. ("Bear Stearns") disclosed that FTC staff has notified its mortgage servicing subsidiary, EMC Mortgage Corporation ("EMC"), that the staff believes EMC and its parent Bear Stearns have violated a number of federal consumer protection statutes in connection with its servicing activities. Bear Stearns further disclosed that FTC staff offered an opportunity to resolve the matter through consent negotiations before seeking approval from the Commission to proceed with the filing of a complaint. According to the disclosure, EMC expects to engage in such discussions with Commission staff.⁸ The FTC cannot comment further on this ongoing law enforcement investigation.

Previously, in 2003, the Commission, along with HUD, announced a settlement of allegations that Fairbanks Capital Corp. (now called Select Portfolio Servicing, Inc.) failed to post consumers' payments upon receipt, charged unauthorized fees, used dishonest or abusive tactics to collect debts, and reported to credit bureaus consumer payment information that it knew to be inaccurate.⁹ In late 2007, based on a compliance review of the company, the Commission negotiated modifications to the 2003 consent order. The modified consent order provides substantial benefits to consumers beyond those in the original order, including additional refunds of fees paid in certain circumstances.¹⁰

The Commission continues to investigate mortgage servicing practices for compliance with the law.

In an effort to enhance interagency coordination, the FTC, the Federal Reserve Board ("FRB"), the Office of Thrift Supervision, and two associations of state regulators have combined forces to undertake an innovative law enforcement project. The agencies are jointly conducting consumer protection compliance reviews and investigations of certain nonbank subsidiaries of bank holding companies with significant subprime mortgage operations.¹¹

Finally, the Commission works to protect consumers of subprime unsecured loans. In June 2008, for example, the Commission filed a lawsuit charging subprime credit card company CompuCredit Corporation ("CompuCredit") and its affiliate with deception in marketing credit cards.¹²

⁷ The Commission's July 25, 2007 testimony before the Subcommittee on Oversight and Investigations of the House Committee on Financial Services detailed the Commission's fair lending program. The testimony is available at www.ftc.gov/os/testimony/P064806hdma.pdf.

⁸ Form 10-K, Bear Stearns Mortgage Funding Trust 2007-AR4 (CIK No. 1393708), at Item 1117 of Reg AB, Legal Proceedings (filed Mar. 31, 2008), available at www.sec.gov/Archives/edgar/data/1393708/000105640408001164/0001056404-08-001164.txt.

⁹ *United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003). The settlement agreement included a \$40 million redress fund for consumers as well as strong injunctive provisions and specific safeguards to prevent the company from foreclosing on consumers without cause.

¹⁰ *United States v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. Sept. 4, 2007) (Modified Stipulated Final Judgment and Order).

¹¹ See Press Release, FTC, Federal and State Agencies Announce Pilot Project to Improve Supervision of Subprime Mortgage Lenders (July 17, 2007), available at www.ftc.gov/opa/2007/07/subprime.shtm.

¹² *FTC v. CompuCredit Corp.*, No. 1:08cv1976-BBM-RGV (N.D. Ga. 2008). The FTC's complaint alleges, among other things, that CompuCredit marketed to consumers with subprime credit ratings a Visa credit card purportedly providing \$300 in credit, using solicitations that touted in bold headlines that certain up-front fees that did not apply. Rather than provide consumers with \$300 of available credit, CompuCredit allegedly immediately charged consumers as much as \$185 in fees that it did not disclose adequately in light of the representations made. These fees left consumers with as little as \$115 in available credit. The FTC alleges that CompuCredit deceived consumers in violation of Section 5 of the FTC Act by misrepresenting the amount of credit available.

With respect to another Visa credit card CompuCredit offered, the FTC alleges CompuCredit marketed to consumers with slightly higher credit scores its Visa credit card purporting to offer "up to \$3,250" in available credit and touted that the card could be used for any purpose. The FTC alleges, however, that CompuCredit misrepresented the amount of available credit because it withheld 50 percent of that credit for 90 days. CompuCredit allegedly also failed to disclose, or failed to disclose adequately, that for the first 90 days, the company would monitor consumers' purchases, and might reduce their credit limit based on an undisclosed "behavioral" scoring model. The Commission alleges that CompuCredit's misrepresentation as to the amount of available credit and its failure to disclose adequately that the types of purchases consumers

Question. Are there steps that the FTC would have liked to have taken that it could not because of limits or restrictions in the FTC's authorities?

Answer. The Commission generally believes that the scope of its legal authority has not prevented the agency from taking steps to address the acts and practices of those within its jurisdiction related to subprime mortgage lending, although the Commission currently lacks authority to seek civil penalties for HOEPA violations. The FTC, however, notes that the FRB recently finalized rules under HOEPA and TILA that will prohibit specific mortgage lending and related practices the FRB determined were unfair and deceptive under the HOEPA.¹³ Both the federal banking agencies and the FTC can enforce the new rules as to the entities they regulate. We note, though, that the federal banking agencies have the authority to obtain civil penalties against entities they regulate who violate the new rules, while the FTC does not.¹⁴ Enacting legislation allowing the FTC to obtain civil penalties against entities within the FTC's jurisdiction who violate the new rules would allow the FTC to enforce the rules more effectively and better protect consumers in the subprime mortgage market, and it would level the playing field such that all entities subject to HOEPA could be subject to civil penalties. We particularly appreciate the inclusion of provisions in the Committee's fiscal year 2009 appropriations bill that would authorize the FTC to obtain civil penalties for violations of rules under HOEPA.

Question. FTC testimony states that the agency has sent warning letters to 200 mortgage lenders about misleading mortgage advertisements—for example, promoting low “teaser rates” without explanation of long-term rates. Are these warning letters a strong enough punishment? Why hasn't the FTC taken enforcement action against these lenders?

Answer. As explained above, the FTC is following up on these warning letters with law enforcement, where appropriate. Currently, the Commission is investigating a number of mortgage originators for potential deceptive advertising.

Question. To what extent is the FTC coordinating with other agencies (such as the FBI, the SEC, and HUD) in pursuing predatory lending?

Answer. The Commission coordinates regularly on financial practices matters with federal banking agencies, the Department of Justice, and HUD. For more than a decade, the FTC has been a member of the Interagency Task Force on Fair Lending, a joint undertaking with DOJ, HUD, and the federal banking regulatory agencies. Task Force members meet often to share information on lending discrimination, predatory lending enforcement, and policy issues. The Commission also has had several conversations with SEC representatives about the subprime mortgage market, although our law enforcement activities focus on different practices in the mortgage industry.

Further, FTC staff are coordinating with other governmental entities to combat foreclosure rescue fraud. Commission staff are participating in task forces concerning foreclosure rescue fraud in seven geographic areas. Task force members in each local area share information about trends in consumer complaints and work to identify solutions. For example, the FTC's Southeast Regional Office is working with a state attorney general's office to identify, investigate, and prosecute cases. These efforts include close coordination on cases under investigation. In some cases, the two agencies have divided responsibility for law enforcement actions; in other cases, the two agencies are working cooperatively on particular targets. The FTC's East Central Regional Office is partnering with a local task force to implement various consumer education and outreach strategies to help consumers. The Southern California Foreclosure Fraud Task Force, in which the FTC's Western Region par-

made could reduce their credit limit were deceptive acts and practices in violation of Section 5 of the FTC Act. The FTC's litigation with CompuCredit is ongoing.

¹³The rules add four protections for a newly defined category of “higher-priced” mortgage loans: (1) they prohibit a lender from making a loan without regard to borrowers' ability to repay the loan; (2) they require creditors to verify the income and assets they rely upon to determine repayment ability; (3) they restrict prepayment penalties; and (4) they require creditors to establish tax and insurance escrow accounts for all first-lien mortgage loans. The rules also prohibit creditors and mortgage brokers from coercing a real estate appraiser to misstate a home's value. And the rules prohibit mortgage servicers from engaging in certain practices, such as pyramiding late fees. The rules also impose specific advertising standards, banning seven deceptive or misleading advertising practices, including representing that a rate or payment is “fixed” when it can change.

¹⁴Under the Federal Deposit Insurance Act, 12 U.S.C. Section 1818(i)(2), federal banking agencies can obtain civil penalties from the entities they regulate who violate the laws they enforce, including TILA and its implementing regulations. The FTC has no comparable authority to obtain civil penalties from the nonbank entities it regulates for violations of TILA and its implementing regulations.

ticipates, has facilitated the coordination of prosecutions by civil and criminal authorities at various levels.

U.S. SAFE WEB ACT

Question. The U.S. SAFE WEB Act, enacted in December 2006, expanded the FTC's authorities to coordinate with foreign law enforcement against spam and other unfair and deceptive practices involving foreign commerce. The FTC's fiscal year 2009 budget request includes additional funding for staff to pursue foreign-located fraud.

How many FTE are currently dedicated to implementing the U.S. SAFE WEB Act, and how would additional staff enhance that effort?

Answer. Because the statute provides a wide range of authorities to the agency, a number of staff members in a number of offices throughout the agency are involved in implementing it. FTC's Office of International Affairs ("OIA"), which helped develop the Act and works to advance international enforcement cooperation, leads the implementation, including chairing an agency-wide steering group of 9 people and several additional ad hoc members for particular issues. At least six attorneys in OIA devote substantial time to implementing the Act, including the Act's provisions on information sharing, investigative assistance, international agreements, cooperation on foreign judgment enforcement and asset recovery, enforcement networks and projects, and foreign staff exchange programs (i.e., the FTC's new "International Fellows" program). In addition, a number of other staff members within OIA as well as in the Bureau of Consumer Protection, the Office of the General Counsel, the Executive Director's Office, and others are involved in implementing and making use of the SAFE WEB authority.

We would use additional staff to enhance our efforts on foreign judgment enforcement and asset recovery for American consumers, information sharing and investigative assistance, and our International Fellows program. We are addressing increasing numbers of requests for information sharing and investigative assistance regarding cross-border matters that may aid FTC enforcement actions or may halt frauds targeting U.S. consumers among others. In addition, we are expanding our International Fellows program to provide opportunities for foreign officials to learn first-hand how the FTC operates and for FTC staff similarly to learn about agencies abroad, thereby improving the ability of the agencies to coordinate and cooperate on law enforcement matters. We are also working to take advantage of our enhanced ability through SAFE WEB to enforce judgments against foreign defendants. With more staff, we can manage additional use of these and other SAFE WEB tools to protect American consumers from cross-border fraud.

Question. What are the biggest obstacles to enforce against foreign fraud? How is the FTC addressing these obstacles?

Answer. The biggest obstacle to enforcing against foreign fraud is the ability of unscrupulous businesses operating in one jurisdiction to evade enforcement by using the Internet and long distance telephone technology to victimize consumers globally and hide behind national borders and laws. In particular, these actors often exploit the inability of many foreign law enforcement agencies to identify schemes and targets and share information about them in a timely and effective manner because of antiquated laws and regulations.

As described above, the FTC is using the tools of the SAFE WEB Act to address these obstacles. The key to combating cross-border fraud is developing better and quicker enforcement cooperation with foreign law enforcement agencies, including information sharing and investigative cooperation. While the FTC has always acted aggressively to combat cross-border fraud, since the Act went into effect at the end of 2006 and implementing regulations in the spring of 2007 the FTC has been able to obtain heightened success by using the tools of the SAFE WEB Act. For example, the FTC's enforcement action against Spear Systems, Inc., alleging international illegal spamming, was significantly enhanced by the agency's use of its information sharing powers under SAFE WEB. Information sharing authorized under SAFE WEB assisted Canadian law enforcement agencies with regard to several cases targeting telemarketing schemes that allegedly defrauded U.S. consumers, as part of the FTC's 2008 Telemarketing Sweep—"Operation Tele-PHONEY." The U.S. SAFE WEB Act has been pivotal in allowing the FTC to take the lead globally in combating cross-border fraud and in encouraging our foreign law enforcement partners to revise their laws in light of the global nature of mass-marketing fraud.

GAS PRICES

Question. The FTC's 2006 study on nationwide gas prices¹⁵ concluded that rising prices could be explained entirely by market forces, not illegal anticompetitive behavior or other activity designed to increase prices relative to costs or to reduce output.

Commissioner Leibowitz filed a dissent to the 2006 report, writing: "... the question you ask determines the answer you get: whatever theoretical justifications exist don't exclude the real world threat that there was profiteering at the expense of consumers."

Is the FTC asking the wrong questions when it comes to investigating these high gas prices? And if so, what is the right question to ask so that we can get to the heart of what Commissioner Leibowitz calls "profiteering at the expense of consumers?"

Answer. For the most part the Agency is asking the right questions, especially today. But I was hoping that the 2006 gas price investigation and the resulting report would cover potential misconduct by oil companies. Instead, staff constructed a theoretical model of legitimate behavior and attempted to determine whether that model could explain gas prices (we could not have uncovered anticompetitive conduct by oil companies because we were not looking for it). To be fair, and as I noted in my 2007 statement, when we began the investigation for the 2006 Report, staff had just finished a major report relating the gas price run-up in the wake of hurricanes Katrina and Rita.¹⁶ In that investigation, staff found no antitrust violations but did find what in my view was inappropriate profit-taking by the oil companies in the wake of a disaster, including price-gouging as that term was defined by Congress.

Going forward, the Commission, in its ongoing rulemaking proceeding, is considering assessing conduct under a standard set out in the Energy Independence Security Act of 2007. To the extent that the profiteering was a result of manipulation of gas prices by individual oil companies, it is possible that a result of the rulemaking proceeding may make it easier to prevent that in the future.¹⁷

The report on the 2006 nationwide price increases was not based on theoretical justifications. Rather it was an analysis and description of the factual evidence of the economic developments actually experienced that could account for the price spikes: facts concerning upward price pressure stemming from seasonal effects on both the demand for and the supply of gasoline, increases in prices for crude oil and ethanol, reductions in refining capacity due to the transition to ethanol, and other identified market factors. This fact-based analysis led to the conclusion that such developments adequately explained the 2006 price increases and that the price phenomena did not indicate anticompetitive conduct.

With respect to the right question to address "profiteering at the expense of consumers," this has to depend on what is meant by "profiteering." To the extent it is intended to refer to the sheer size of profits, decisions on how to address this, such as through fiscal policy or price controls, are very fundamental policy determinations that are properly reserved for Congress. The Commission, however, must—and does—continue zealously to seek out and prevent any violations of the antitrust laws, including those that illegally raise prices and profits. Furthermore, Congress has given the Commission authority with respect to manipulative or deceptive devices or contrivances regarding this industry, and, as Commissioner Leibowitz notes above, the Commission is currently engaged in a rulemaking proceeding under this authority.

Question. Commissioner Leibowitz cited that among other things, the investigation found "disturbing conduct by . . . petroleum companies."

What disturbing conduct did the FTC observe? What action did the FTC take, and does the agency continue to see this kind of behavior?

Answer. As described above, the Katrina Report found that there was price gouging (under the Congressional definition) by some oil companies in the wake of

¹⁵ Federal Trade Commission Report On Spring/Summer 2006 Nationwide Gasoline Price Increases (August 2007) (available at <http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf>); Dissenting Statement of Commissioner Jon Leibowitz Regarding the Federal Trade Commission and Department of Justice Antitrust Division Report on Spring/Summer 2006 Nationwide Gasoline Price Increases (available at <http://www.ftc.gov/reports/gasprices06/P010401Gas06dissent.pdf>).

¹⁶ See Dissenting Statement at 1; see also Federal Trade Commission Report on the FTC's Investigation of Gasoline Price Manipulation and Post-Katrina Price Increases (May 2006) (available at <http://www.ftc.gov/reports/060518PublicGasolinePricesInvestigationReportFinal.pdf>).

¹⁷ Information on the Commission's rulemaking proceeding is available at <http://www.ftc.gov/ftc/oilgas/index.html>.

the disaster. And it is disturbing that oil companies made record profits even as many consumers suffered from high energy prices in the affected area. The conduct found was not a violation of the antitrust laws however. Going forward, the Commission, in its ongoing rulemaking proceeding is considering assessing conduct under a standard set out in the Energy Independence Security Act of 2007 and it may ultimately be that we look at certain oil company behavior using a broader definition of misconduct.

Neither the major investigation reported in the Katrina report nor the careful analysis the following year of the 2006 price spikes showed evidence of behavior inconsistent with competitive responses to market conditions. In particular, with respect to the Katrina aftermath, the agency's extensive investigation found that the market, including price increases for a period of time, functioned appropriately to enable increased supply to flow into the affected areas and to reduce prices to consumers swiftly. With respect to the "price gouging" identified in the Commission's post-Katrina report, in fifteen instances prices met the statutory definition of "price gouging" laid down for the study, but all except one were explainable by identifiable market factors other than those incorporated into that definition. As noted, the agency continues to scrutinize the industry carefully to identify possible anti-competitive activity, and to investigate and take enforcement action whenever warranted. In addition, as noted, the agency is conducting a rulemaking proceeding under its new authority to prohibit manipulative or deceptive devices or contrivances and our expectation is that this proceeding will be completed this year.

RESOURCES FOR PRICE MONITORING

Question. The President ordered the 2006 study of nationwide gas prices in April of 2006, yet the FTC report was published in August 2007—a full 16 months later.

If the FTC is conducting real-time monitoring of gas prices for anticompetitive behavior, why did it take 16 months to come to a conclusion on this study? How can the FTC stop oil companies in their tracks if investigations take this long?

Answer. The inquiry into the 2006 price increases—conducted jointly with the Department of Justice and with assistance from the Department of Energy's Energy Information Administration—focused on the gasoline price increases experienced nationwide in the spring and summer of that year. The inquiry identified six broad market factors that appeared to contribute to the national average price increases during the spring and summer of 2006: seasonal effects, increases in crude oil prices, increases in ethanol prices, capacity reductions due to the transition to ethanol, reductions in refiners' ability to produce gasoline, and increases in demand. It required careful financial and economic analysis of price and cost data spanning an extended period of time, supplemented by interviews with refiner personnel and a review of key company documents, to identify the relative contribution of each factor to the price increases and conclude that those market factors provided an adequate explanation for the price increases without giving rise to an inference of anti-competitive behavior.

In this instance, the FTC Gasoline and Diesel Price Monitoring Project was of limited value in explaining the nationwide, average increases, because the project's model is designed to focus on a different phenomenon—i.e., whether an observed difference between two retail or wholesale areas' local gasoline or diesel prices departs from the difference that one would expect based on historical statistical relationships.

As you know, the FTC is primarily a law enforcement agency rather than a supervisory or regulatory agency. As a law enforcement agency, the FTC is empowered to take legal action to challenge suspect behavior under the federal laws it enforces. In such proceedings, the FTC must meet burdens of proof as determined by the relevant statutes and as interpreted by the federal courts. For practices that do violate a federal law, the FTC has available a wide variety of remedies to halt the practices and reverse their harmful results. I also note that the task involved in this investigation is not necessarily the same as that of a law enforcement investigation, which may stem, for example, from a merger filing, information on specific company acts, or a more localized or straightforward pricing anomaly rather than a nationwide price movement.

Question. Does the FTC have sufficient resources to analyze the oil and gas markets quickly enough to promptly act and stop anticompetitive behavior?

Answer. The FTC believes that its fiscal year 2009 funding request would provide sufficient resources to meet the agency's Consumer Protection and Maintaining Competition goals, including those involving oil and gas markets. I note, however, that the budgets that serve as the basis of the appropriations requests are prepared many months before requests are submitted to Congress, and they cannot always

predict changes to the agency's work that are dictated by emerging events or Congressional directives or requests. A recent example of this is the new statutory authority Congress gave the FTC to prescribe anti-manipulation rules in the energy sector. The Commission will continue, as it has in the past, to redistribute existing resources to meet these new demands, while assessing the need for additional resources.

PRICE GOUGING

Question. What is the FTC's opinion on federal anti-price gouging legislation? On the state level, has the agency observed a deterrent effect? Would federal price gouging laws enhance state laws?

Answer. The Commission has testified on several occasions that federal price gouging legislation likely would harm consumers by reducing the incentives and increasing the risks for refiners to move additional supply into affected areas and take other steps to respond to market forces after natural disasters.¹⁸ After Hurricanes Katrina and Rita in 2005, gasoline prices briefly spiked higher in many parts of the country. Consumers understandably are upset when they face dramatic price increases within very short periods of time, especially during a disaster. But price gouging laws—particularly inasmuch as they could well deter firms from taking beneficial steps to respond to post-disaster shortages—likely will do consumers more harm than good. Law enforcement actions premised on a notion of restricting price increases essentially are a form of price control, which could produce longer lines at the pump and prolong the gasoline crisis. Although no consumer likes price increases, such an increase in fact can help to make the gasoline shortage less intense and shorter-lived than it otherwise would have been.

Prices play a critical role in our economy: they signal producers to increase or decrease supply, and they also signal consumers to increase or decrease demand. In a period of shortage—particularly with a product, like gasoline, that can be sold in many markets around the world—higher prices create incentives for suppliers to send more product into the market, while also creating incentives for consumers to use less of the product. For instance, sharp increases in the price of gasoline can help curtail the panic buying and “topping off” practices that cause retailers to run out of gasoline. In addition, higher gasoline prices in the United States in the wake of the 2005 hurricanes resulted in the shipment of substantial additional supplies of foreign gasoline to the United States.¹⁹ If price gouging laws distort these natural market signals, markets may not function well and consumers would be worse off.

To be sure, there may be situations in which sellers go beyond the necessary market-induced price increase. A seller might misjudge the market and attempt to charge prices substantially higher than conditions warrant or than its competitors are charging. News stories of gasoline retailers panicking and setting prices of \$6.00 per gallon after Katrina are evidence of such misjudgments. But the market—not price gouging laws—is the most effective cure for these. Temporary prices that are wildly out of line with competitors' prices do not last when consumers quickly discover that other stations are charging lower prices. A single seller in a market structured like gasoline retailing cannot unilaterally raise prices for long above the level justified by supply and demand factors. The few retailers who raised prices to the \$6.00 level reduced them just as quickly when it became apparent that they had misjudged the market.

A price gouging law likely would be difficult to enforce fairly. The difficulty for gas station managers, as well as for enforcers, often is knowing when the managers have raised prices “too much,” as opposed to responding to reduced supply conditions. It can be very difficult to determine the extent to which any more moderate price increases are necessary. Examination of extant state price gouging laws and of the federal gasoline price gouging legislation that has been introduced indicates

¹⁸ Commissioner Leibowitz notes that, as he has stated in his concurrence to the Commission's report “Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases,” twenty-nine states and the District of Columbia have price gouging laws that provide for either civil or criminal penalties and, in some situations, both. Six of these states and the District of Columbia expressly are permitted by their statutes to cap price increases during an emergency. Most of these price gouging statutes require an emergency declaration and, to the Commissioner's mind, seem entirely unthreatening to the operation of the free market—and, indeed they may serve a salutary purpose of discouraging outliers from profiteering in the aftermath of a disaster.

¹⁹ Total gasoline imports into the United States for September and the first three weeks of October 2005 (after the August hurricanes) were approximately 34 percent higher than imports over the same seven-week period in 2004. See U.S. Dep't of Energy, Energy Information Admin., U.S. Weekly Gasoline Imports (Oct. 26, 2005), available at http://www.eia.doe.gov/oil_gas/petroleum/info_glance/gasoline.html.

that the offense of “price gouging” is difficult to define. For example, some bills define “gouging” as consisting of a 10 or 15 percent increase in average prices, while most leave the decision to the courts by defining gouging in nebulous terms such as “gross disparity” or “unconscionably excessive.” Some, but not all, make allowances for the extra costs that may be involved in providing product in a disaster area. Few, if any, proposed federal bills or state laws take account of market incentives for sellers to divert supply from their usual customers in order to supply the disaster area, or incentives for consumers to reduce their purchases as much as possible, minimizing the shortage. Ultimately, the inability to agree on what should be prohibited indicates the risks in developing and enforcing a federal statute that could be counterproductive to consumers’ best interest. Moreover, much legislation provides substantial criminal penalties for those found guilty of “price gouging”—a feature of the legislation that is likely to persuade significant numbers of merchants to close down operations rather than run the risk of going to prison for raising prices enough to cover ongoing costs and maintain adequate supplies.

For all of these reasons, a majority of the Commission has concluded that federal price gouging legislation would harm consumers overall.

The Commission has not studied state price gouging laws in depth to determine if they actually have any deterrent effect.²⁰ Because of the potential overall harm to consumers of price gouging laws, I cannot say that a federal law would be likely to enhance the states’ ability to protect consumers.

STRATEGIC PETROLEUM RESERVE

Question. A provision suspending the acquisition of petroleum for the Strategic Petroleum Reserve passed the Senate recently. Based on the FTC’s historical models, would the suspension have significant effect on prices at the pump?

Answer. As noted above, the FTC’s Gasoline and Diesel Price Monitoring Project—with its focus on historical differences in local gasoline or diesel prices in retail or wholesale areas—is not designed to predict how changes in crude oil availability might affect crude oil prices or gasoline or diesel prices. Accordingly, the Monitoring Project model cannot provide any insight into the possible effects on prices at the pump of a suspension of additions to the Strategic Petroleum Reserve.

QUESTIONS SUBMITTED BY SENATOR SAM BROWNBACK

GASOLINE PRICES

Question. On May 23, 2007, the FTC testified before the Joint Economic Committee that “mergers of private oil companies have not significantly affected worldwide concentration in crude oil. This fact is important, because crude oil prices historically have been the chief determinant of gasoline prices.” Given the fact that the share of gasoline prices attributable to crude oil costs has risen to 71.8 percent from around 50 percent a year ago, would you say that crude oil costs are likely an even stronger determinant today?

Answer. The average spot price of crude oil, as reported by the Energy Information Administration, nearly doubled between May 2007 and May 2008, from a monthly average of \$67 per barrel to approximately \$125 per barrel. Crude oil prices rose even more after May 2008, varying daily between about \$130 and \$145 per barrel during June and the first three weeks of July. This increase in crude oil prices has by far outstripped changes in any other element relevant to the production of gasoline. Crude oil prices are a stronger determinant of gasoline prices today because any given percentage change in crude oil prices from current levels will have a greater impact on pump prices than in previous years, when crude oil prices were dramatically lower.

ETHANOL

Question. Has the FTC looked at concentration in the ethanol market? Is concentration increasing or decreasing?

Answer. The FTC has closely scrutinized and reported on production and concentration in the United States ethanol market since late 2005. In November 2007, the Commission issued its third annual report on the U.S. industry. The series of FTC reports shows that concentration in the industry has been decreasing. The 2007 report noted that, as of September 2007, 13 firms had entered into the produc-

²⁰The Commission’s report following Hurricanes Katrina and Rita noted that the prices of nearly all the retailers subjected to state enforcement actions were consistent with market trends or other market-based factors.

tion of ethanol during the preceding year, bringing the total number of U.S. producers to 103.²¹ As new firms have entered, the market, which is unconcentrated by any measure of capacity or production, has become even more unconcentrated.

TELECOMMUNICATIONS

Question. The proposed Reauthorization bill S. 2831, which is currently before the Senate Commerce Committee, proposes a waiver of the telecommunications common carrier exemption. This exemption bars the agency from reaching certain conduct of telecommunications companies. The Commission has testified in favor of the repeal of the exemption. However in seeking this new authority, the FTC has never cited an instance where the FCC failed to fulfill its responsibilities. The Telecommunications Consumers Division within the FCC's Enforcement Bureau investigates the practices of companies engaged in various telecommunications-related activities. So, the FCC already is exercising its statutory authority in the precise areas in which the FTC seeks jurisdiction. If this exemption were to be lifted what would be the benefit? What could the FTC accomplish or reach that is not currently dealt with? Because, to permit two different agencies to impose regulations covering the same type of conduct could very easily become unduly burdensome on companies, while not providing a corresponding benefit to or protection for consumers.

Answer. The FTC's request that Congress repeal the FTC Act exemption for common carriers as applied to providing telecommunication services is not a commentary on or reflection of concern about the work done by the FTC's sister agency, the Federal Communications Commission. Indeed, over the years, the FTC has worked closely with the FCC on numerous issues of joint interest. Currently, the two agencies coordinate enforcement of their overlapping Do Not Call rules, and the FCC is a member of the federal-state law enforcement task force on prepaid calling cards that the FTC established last year.

The two agencies, however, have very different missions and law enforcement tools. The FTC is the nation's consumer protection authority and, as such, has extensive experience investigating and bringing federal court and administrative actions against companies engaged in deceptive and unfair practices. As a result, the FTC has substantial litigation experience and a robust body of case law to rely on in seeking to stop deceptive or unfair acts and practices that harm consumers, and to get money back for injured consumers.

The common carrier exemption dates from a period when telecommunications were provided by highly-regulated monopolies. The exemption as applied to telecommunications services is now outdated, and the FTC has repeatedly found its consumer protection work impeded by the exemption in ways that are detrimental to consumers. Most recently, the common carrier exemption has been an issue in two FTC cases against the distributors of prepaid calling cards. In those cases, the FTC has alleged that the distributors engaged in deceptive marketing practices by misrepresenting the number of calling minutes provided by their cards and failing to disclose or to adequately disclose fees and charges associated with their cards. *FTC v. Clifton Telecard Alliance One LLC*, No. 2:08-cv-01480-PGS-ES (D.N.J.) (filed March 25, 2008); and *FTC v. Alternatel, Inc.*, No. 08-21433-CIV-Jordan/McAliley (S.D. Fla.) (filed May 19, 2008).²² In both cases, the FTC sought and received temporary restraining orders prohibiting defendants from, inter alia, misrepresenting the number of calling minutes provided by the cards they distribute, and failing to disclose fees and charges that reduce the value of their calling cards. Because of the common carrier exemption, the FTC has not pursued the carriers that provide the telecommunications services for the cards at issue. As a result, in both cases the defendants have moved to dismiss the FTC's case on the grounds that the underlying telecommunications carriers are necessary parties that cannot be joined by the FTC, because of the common carrier exemption. Although the FTC has opposed defendants' motions, and is confident that it will win on the merits, the exemption has created a litigation issue for the FTC. More fundamentally, the exemption directly impedes the FTC's ability to hold carriers accountable for their role in allegedly deceptive and unfair practices in the calling card industry.

The prepaid calling card industry is not an isolated example of an area in which the common carrier exemption hampers the FTC's ability to protect consumers from deceptive and unfair acts or practices. As information, entertainment, and payment systems converge, common carriers are providing an increasing number of new serv-

²¹ Federal Trade Commission, 2007 Report on Ethanol Market Concentration (Nov. 2007), available at <http://www.ftc.gov/reports/ethanol/2007ethanol.pdf>.

²² In the *Clifton* case the Commission has also alleged that defendants failed to disclose or to adequately disclose that the value of their cards may be reduced even when a call does not connect.

ices. Now, consumers can purchase their voice services bundled with Internet access services and video services. Moreover, landline and cellular carriers bill consumers for unlimited numbers of services provided by third parties. The FTC has brought dozens of cases against companies that the FTC alleges have crammed unauthorized charges onto consumers' phone bills.²³ The common carrier exemption, however, has given rise to issues that complicate litigation in some of these cases,²⁴ and has impeded the Commission's ability to consider whether and to what extent phone companies should be held responsible for placing those charges on their customers' phone bills.

MORTGAGE MARKETING

Question. Could you elaborate for the record on some of the most egregious examples of unfair and deceptive advertising that the FTC has reviewed in connection with mortgage brokerage activities? What are the underlying themes—is it rates that adjust after a month, unclear disclosures of what the terms are, failure to disclose that the quoted terms didn't include escrow information clearly, or represented a type of bait and switch approach? Just give us a flavor of some of the most significant aspects of this type of marketing.

Answer. The Commission has been actively investigating mortgage lending practices for many years.²⁵ In June 2007, the agency staff conducted a nationwide review of mortgage ads, including some in Spanish, featuring claims for very low rates or monthly payment amounts without adequate disclosure of other important loan terms. The FTC staff reviewed the ads to determine whether they may be deceptive in violation of Section 5 of the FTC Act or may violate the Truth in Lending Act ("TILA").²⁶ The Commission staff then commenced investigations of or sent warning letters to advertisers whose ads raised concerns. This included warning letters that FTC staff sent to more than 200 mortgage brokers and lenders, and media outlets that carry their advertisements for home mortgages, informing them that their ads may be unlawful. The agency staff recently reviewed the current advertising of those who received warning letters. We will take law enforcement action where appropriate if this review or other monitoring of mortgage advertising claims reveals that an advertiser has violated the law.

Through our deceptive mortgage advertising sweep and other monitoring of mortgage ads, the FTC has reviewed many mortgage ads for problematic claims. The ads frequently tout the most favorable terms of a mortgage without revealing critical facts consumers need to make well-informed decisions. We have encountered numerous ads offering low rates or monthly payments without disclosing adequately significant limitations or conditions. For example, an ad may tout that a mortgage is available with only "1 percent Payments," yet fail to disclose that 1 percent is not an interest rate or that this payment rate only applies during a brief introductory period. We have also encountered ads offering loans with "fixed" low rates or monthly payments which in fact are loans with adjustable rates or payments. For instance, an ad may state in large bold print, "30-Year Fixed, 1.99 percent." Only at

²³ See, e.g., *FTC v. Verity International Ltd.*, 335 F. Supp. 2d 479 (S.D.N.Y. 2004), *aff'd* in part, *rev'd* in part, 443 F.3d 48 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1868 (2007); *FTC v. Nationwide Connections, Inc.*, No. 06-80180-CIV-Ryskamp/Vitunack (S.D. Fla. 2006); *FTC v. Websource Media, LLC.*, No. H-06-1980 (S.D. Tex. 2006); *FTC v. Epixtar Corp.*, No. 03-CV-8511 (DAB) (S.D.N.Y. 2003); *FTC v. Sheinkin*, No. 2-00-363618 (D.S.C., 2000); *FTC v. Mercury Marketing of Delaware, Inc.*, No. 00-CV-3281 (E.D. Pa. 2000); *FTC v. Int'l Telemedia Assocs., Inc.*, No. 1-98-CV-1925 (N.D. Ga. 1998); *FTC v. Audiotex Connection, Inc.*, No. C-97 0726 (DRH) (E.D.N.Y. 1997).

²⁴ For example, in *FTC v. Verity International Ltd.*, the Commission alleged that the defendants orchestrated a scheme whereby consumers seeking online entertainment were disconnected from their regular ISPs and reconnected to a Madagascar phone number. The consumers were then charged between \$3.99 and \$7.78 per minute for the duration of each connection. AT&T and Sprint—which were not parties to the FTC enforcement action—had carried the calls connecting the consumers' computers to the defendants' servers. The defendants therefore argued that the entertainment service in question was provided on a common carrier basis and thus outside the FTC's jurisdiction. One defendant also claimed to be a common carrier itself and hence beyond FTC jurisdiction. Although both the District Court and the Court of Appeals rejected those arguments, the FTC had to expend substantial time and resources litigating the question of jurisdiction.

²⁵ The Commission's April 29, 2008 testimony before the Subcommittee On Interstate Commerce, Trade, and Tourism of the Committee On Commerce, Science, and Transportation, United States Senate provides a comprehensive description of the FTC's law enforcement, policy, and consumer education work in the subprime mortgage market in recent years. The testimony is available at <http://www.ftc.gov/os/testimony/P064814subprimelending.pdf>.

²⁶ See Press Release, FTC Warns Mortgage Advertisers and Media That Ads May Be Deceptive (Sept. 11, 2007), available at www.ftc.gov/opa/2007/09/mortsurf.shtm.

the bottom or reverse side, in tiny print, will it reveal that it is only fixed for the first year, and that after that will increase every year by as much as 7 percent.

DEBT RELIEF

Question. Can you outline examples of some of the most egregious cases of consumer fraud that you've witnessed in the Debt Relief/Debt Counseling arena? Obviously, people are hurting and looking for hope when they go to these services. What characteristics delineate the legitimate players in the market from those simply looking to prey upon desperate people?

Answer. The Commission has prosecuted about a dozen companies that it alleged falsely promised lifelines to consumers overwhelmed with credit card debt.²⁷ Some examples of egregious alleged conduct include the following cases:

In its largest case in this area, the FTC sued AmeriDebt, Inc., a purported credit counseling organization.²⁸ The Commission alleged that AmeriDebt deceived consumers with claims that it was a non-profit organization that provided bona fide debt counseling services. In fact, the FTC alleged, AmeriDebt funneled profits to affiliated for-profit entities and individuals. The Commission also alleged that AmeriDebt deceived customers by claiming that it did not charge an up-front fee when, in fact, AmeriDebt kept its clients' first payments as a fee, rather than disbursing the money to their creditors as promised. The FTC's settlement with AmeriDebt, which filed for bankruptcy during the litigation, bans the company from the industry. Subsequently, on the eve of trial, AmeriDebt's founder agreed to a \$35 million settlement.²⁹

In another case, the Commission sued a Canadian telemarketer, alleging that it preyed on American consumers by falsely promising that, for an upfront fee of \$700, it would provide interest rate reduction services for consumers with high-interest credit cards.³⁰ Although the telemarketer claimed affiliation with consumers' credit card companies, the extent of its services consisted of a single call to the creditor asking for an interest rate reduction, which was routinely denied. The Commission also alleged that the defendant did not honor its refund guarantee to consumers who did not experience the promised substantial savings.

The Commission also has brought actions against for-profit debt settlement companies, alleging that defendants falsely promised to reduce substantially credit card debt.³¹ In those cases, defendants allegedly deceived consumers into paying hundreds or thousands of dollars in upfront fees by misrepresenting that they would obtain lump sum settlements of consumers' credit card debt. In fact, the Commission alleged that defendants kept the upfront fees and had little if any success in obtaining the promised settlements.

There are a number of features for consumers to look for when assessing the legitimacy of debt relief services being offered. The legitimate non-profit credit counseling agencies commonly provide free budget analysis for consumers seeking a manageable debt repayment plan. They do not charge substantial fees for services. After reviewing a consumer's financial condition, the these legitimate agencies explain the possible options for the consumer. If consumers have sufficient income, the agencies can negotiate a debt consolidation plan (known as a "debt management plan") directly with the creditors on behalf of the consumer. The consumer then pays the agency one monthly amount which the agency then disburses to the credi-

²⁷ *FTC v. Debt-Set*, No. 07-558 (D. Colo. 2007); *FTC v. Select Personnel Mgmt., Inc.*, No. 07-0529 (N.D. Ill. 2007); *FTC v. Dennis Connelly*, No. 06-701 (C.D. Cal. 2006); *FTC v. Express Consolidation*, No. 06-61851 (S.D. Fla. 2006); *US v. Credit Found. of Am.*, No. 06-3654 (C.D. Cal. 2006); *FTC v. Debt Solutions, Inc.*, No. 06-0298 (W.D. Wash. 2006); *FTC v. Debt Mgmt. Found. Servs., Inc.*, No. 04-1674 (M.D. Fla. 2004); *FTC v. Integrated Credit Solutions, Inc.*, No. 06-00806 (M.D. Fla. 2006); *FTC v. National Consumer Council, Inc.*, No. 04-0474 (C.D. Cal. 2004); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (D. Mass. 2004); *FTC v. Innovative Sys. Tech., Inc., d/b/a Briggs & Baker*, No. 04-0728 (C.D. Cal. 2004); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 (C.D. Cal. 2002).

²⁸ *FTC v. AmeriDebt, Inc.*, No. 03-3317 (D. Md. 2003).

²⁹ See *FTC v. AmeriDebt, Inc.*, No. 03-3317 (D. Md. Jan. 9, 2006) (Stipulated Final Judgment and Permanent Injunction as to DebtWorks, Inc. and Andris Pukke). Subsequently, the court-appointed receiver determined that primary defendant Andris Pukke had hidden assets from the FTC, and the court entered a judgment requiring him to turn over tens of millions of dollars' worth of additional assets. Because he resisted turning over his assets even after the court found him in contempt of court, the Court ordered his incarceration pending full cooperation, lasting almost a month.

³⁰ *FTC v. Select Personnel Mgmt., Inc.*, No. 07-0529 (N.D. Ill. 2007) (litigation ongoing).

³¹ E.g., *FTC v. Debt-Set*, No. 07-558 (D. Colo. 2007).

tors. The Commission's education and outreach program in this area includes a number of publications to help consumers who are seeking debt relief services.³²

REAL ESTATE MARKETS

Question. Can you discuss for the record any inquiries the FTC has made into "infomercial" type marketing of "get rich easy" real estate investment schemes? Have you looked at the role those programs may have played in encouraging irresponsible speculation in the real estate market, including flipping activities that went bad? Or the degree to which those programs included suggestions that participants engage in occupancy fraud that led to a high degree of early payment defaults?

Answer. The Commission's testimony emphasized recent law enforcement and outreach efforts to tackle deceptive and unfair practices involving mortgage lending and servicing, and to halt mortgage foreclosure rescue scams, which impact the real estate market. As a general matter, we know that scam artists seize upon "hot" areas, such as real estate investment, to promote fraudulent business opportunities as "get rich quick" schemes. Such scammers promote their false promises of wealth through any medium, including infomercials.

The Commission has aggressively targeted the broad range of business opportunity frauds. In December 2006, the agency spearheaded "Project FAL\$E HOPE\$," which was a coordinated civil and criminal crackdown by federal and state law enforcers targeting more than 100 bogus business opportunities.³³ As part of that sweep, the FTC announced partial settlements in the Commission's pending case against a group of defendants that the FTC alleged telemarketed a product that purportedly instructed consumers on how to make easy money buying and selling privately held mortgages. In 2007, the Court issued summary judgment in the case by against the remaining defendants ordering them to pay \$17 million in consumer redress.³⁴ The agency is generally aware that some real estate investment schemes have been promoted through infomercials, but it is not aware of any clear connection between such investment schemes and irresponsible speculation or occupancy fraud in the marketplace.

The FTC will continue to challenge false "get rich quick" claims that promote bogus investment opportunities, including those involving real estate, and will continue to combat deceptive and unfair practices that impact the real estate market.

CONCLUSION OF HEARINGS

Senator DURBIN. If there are no further questions, the subcommittee stands recessed.

[Whereupon, at 4:30 p.m., Wednesday, May 14, the hearings were concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

³² Consumer education materials on debt relief and credit counseling issues are directly accessible from the FTC's webpage, Credit and Loans: In Debt?, available at www.ftc.gov/bcp/menus/consumer/credit/debt.shtm. In Spanish, the materials are available from the FTC's webpage, Crédito y Préstamos: ¿Endeudado?, available at www.ftc.gov/bcp/menus/consumer/credit/debt_es.shtm.

³³ <http://www.ftc.gov/opa/2006/12/falsehopes.shtm>.

³⁴ <http://www.ftc.gov/opa/2007/05/stefanchik.shtm>.

Material Submitted Subsequent to the Hearings

[The following agencies were unable to testify and have submitted statements for inclusion in the record.]

OFFICE OF PERSONNEL MANAGEMENT

PREPARED STATEMENT OF THE HONORABLE LINDA M. SPRINGER, DIRECTOR

Mr. Chairman and members of the subcommittee: I appreciate the opportunity to submit for the record a statement addressing the appropriations request for the Office of Personnel Management (OPM) for fiscal year 2009.

As you know, OPM provides a variety of products and services to the nearly 1.8 million employees in the Federal Government. Some of our products and services include managing health insurance for approximately 8 million current and former Federal employees and their families, administering retirement services for over 2 million retirees from all branches of Government, completing 90 percent of background investigations for industry and Federal agencies, and administering career development programs. As the OPM Director, I am committed to successfully delivering on our responsibilities on a timely basis. In short, I believe the American citizens and the Federal civilian workforce expect us to get things done, and our fiscal year 2009 budget request will allow us to do just that.

We are requesting \$20 billion to carry out our mission in fiscal year 2009. Of this total, \$19.8 billion is requested for mandatory programs and \$228.9 million for discretionary activities. The discretionary request reflects \$211 million for Salaries and Expenses—including transfers from the Trust Fund Accounts of \$118.1 million—and \$18 million for the Office of the Inspector General. The total discretionary request reflects a net decrease of \$15.4 million compared to the fiscal year 2008 enacted level. I also want to note that OPM operates a revolving fund for the administration and operations of a number of programs including our Federal investigative services and Government-wide training efforts.

RETIREMENT CLAIMS PROCESSING AND BENEFITS PROGRAMS

OPM's request includes funding to improve the services it delivers to Federal employees, annuitants, and their families through the retirement and insurance programs.

On February 25, 2008, OPM began the rollout of the first ever Federal electronic retirement system. The budget requests an additional \$15.2 million in No-Year Trust funds for continuation of this project. These funds will allow OPM to continue the conversion of millions of paper retirement records to electronic data and contract for the information technology needed for the system so that retirees can receive full payments once they separate from service eliminating interim payments at reduced amounts. At full rollout, employees will be able to model their retirement and initiate the process.

FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM (FEHB)

As the administrator of the FEHBP, OPM will continue to negotiate and contract with private insurance companies that offer a broad range of health insurance benefits, including high-deductible health plans with Health Savings Accounts and consumer-driven health plan options. As such, OPM will spend \$26 million in fiscal year 2009 to ensure the viability of the Program's 283 health care plans covering over 8 million people. As usual, OPM will continue to carry out tough negotiations with health carriers to contain premium hikes. Over the years these negotiations have resulted in employee premiums that are substantially lower than those of the private sector while maintaining benefit levels, and continuing to provide, improve, and expand tools so customers can make informed health insurance decisions. In fact, the FEHBP increase for 2008 was 2.1 percent, compared to an average 8.7 per-

cent increase for the private sector and a 6.3 percent increase for the California Public Employees' Retirement System during that same year.

HUMAN RESOURCES MANAGEMENT

In fiscal year 2009, OPM will pursue policy initiatives that continue to reform human resources management in Federal agencies. We will work with the Department of Defense to ensure the reforms underway link pay to performance in a fair and consistent manner. At the same time, OPM will work with other agencies engaged in implementing Alternative Personnel Systems to assess the lessons learned from various modernization efforts. Mr. Chairman, in the last half-century, the Federal workforce has changed significantly, and the old personnel system has not kept pace. We are, therefore, striving to modernize the systems designed to recruit and retain federal employees.

The fiscal year 2009 budget will allow OPM to maintain the competitiveness of Federal employee compensation and benefits by exploring ways to refine market adjustments to Federal pay, and providing Federal employees with opportunities, benefits, and service delivery that compare favorably with other employers. For instance, OPM will continue to develop new workforce recruitment strategies and tools, and further improve the hiring process by developing a life-cycle reform model for agencies to adopt to streamline the current recruitment process. And last but not least, OPM will spend \$200,000 to continue to support the Nation's returning Veterans by providing assistance in finding job opportunities with the Federal Government.

IMPLEMENTING HUMAN CAPITAL STANDARDS FOR SUCCESS

OPM will use requested funds to engage Federal agencies in implementing the Human Capital Assessment and Accountability Framework, and other best practices in human capital management, in keeping with the Merit System Principles, veterans' preference, and other standards. At the beginning of fiscal year 2008, 17 of the 26 agencies reporting under the President's Management Agenda Scorecard have met these standards, up from 11 in 2006, eight in 2005, and zero in 2003. As a result, more than 99 percent of the Federal civilian workforce is employed by agencies that have made significant progress toward meeting these standards.

Through its Compliance Program, OPM will continue to evaluate, review, and ensure agencies comply with Merit System Principles and veterans' preference, and to ensure whistleblower protection and other rights and privileges are honored and protected. OPM will strengthen this program through a human capital accountability system that holds agencies accountable for adhering to these principles, laws, and rules, as well as the human capital best practices referenced above.

HUMAN RESOURCES LINE OF BUSINESS

In 2009, OPM will continue to be a leader in the President's Management Initiative for Expanded Electronic Government and has included \$7,202,000 in its request for this purpose. The requested resources will support the Human Resources Line of Business (HR LOB) and Enterprise Human Resources Integration (EHRI). HR LOB will continue to identify and document common functional, technical, and data requirements consistent with Federal human resources policies and will work toward the establishment of Federal and private sector Shared Service Centers to meet these requirements. During 2009, the EHRI project will continue to modernize how the Federal Government maintains, stores, protects, and transmits information on human resources transactions.

SECURITY-RELATED ACTIVITIES

The fiscal year 2009 request includes funding for a number of important security-related activities. OPM will implement Homeland Security Presidential Directive 12 (HSPD-12), Policy for a Common Identification Standard for Federal Employees and Contractors, which was signed by the President on August 27, 2004. This mandates the circulation of a Federal standard for a secure and reliable form of identification for Federal employees and contractors. HSPD-12 requirements will enhance OPM's strategic goal of improving security and emergency planning actions throughout the agency.

REVOLVING FUND

OPM also provides a variety of ongoing services that are financed by other agencies through our revolving fund. These services include providing one-stop access to high-quality e-Training products and services; offering professional development and

continuous learning for Federal managers and executives; providing employment information and assessment services; automating other agencies' staffing systems; providing examining services when requested by an agency; providing technical assistance and consulting services on all facets of Human Resources management; testing potential military personnel for the Department of Defense where it is cost-effective for OPM to do so; managing the selection, coordination, and development of Presidential Management Fellows; and conducting investigations for employees to determine whether they are suitable for employment, as well as more in-depth investigations for employees whose positions require security clearances. For those ongoing revolving fund responsibilities, the fiscal year 2009 budget includes an estimated \$1 billion in obligations and 3,131 FTE to be financed through payments for OPM's services by other agencies.

MANDATORY PAYMENT ACCOUNTS

The OPM budget request also includes mandatory appropriations to fund the Government contributions to the health benefits and life insurance programs for Federal annuitants.

For the approximately 1.9 million annuitants participating in the Federal Employees Health Benefits Program, we estimate that about \$9.6 billion will be needed to pay the Government's share of the cost of coverage. That represents an increase of \$769 million over fiscal year 2008. We estimate that, for the 500,000 annuitants under age 65 who elect post-employment life insurance coverage, an appropriation of \$46 million will be required.

Also, as mandated by the financing system established in 1969 by Public Law 91-93, liabilities resulting from changes (principally pay raises) since that year that affect retirement benefits must be amortized over a 30-year period. For that purpose, we are requesting a "such sums as may be necessary" payment to the Civil Service Retirement and Disability Fund in the amount of \$10.2 billion. This represents an increase of \$100 million to cover the service cost of the Civil Service Retirement System, which is not funded by and for active employees.

Thank you again for the opportunity to provide for the record a discussion of OPM's budget request for fiscal year 2009. I would be pleased to provide any additional information the subcommittee may need.

PREPARED STATEMENT OF THE HONORABLE PATRICK E. MCFARLAND, INSPECTOR GENERAL

Mr. Chairman and members of the subcommittee: Thank you for providing me this opportunity to discuss the President's fiscal year 2009 request for appropriations for the Office of the Inspector General at the Office of Personnel Management (OPM). The total request for the Office of the Inspector General is \$18,000,000, which is \$600,000 below the amount enacted for fiscal year 2008. Of our requested amount, \$1,538,000 is from the salaries and expenses/general fund and \$16,462,000 is from the trust funds. These resources are requested to perform our core functions which include:

- Conducting audits, investigations, and evaluations of agency programs and operations, including primarily carriers participating in the Federal Employees Health Benefits Program (FEHBP), the associated information systems, and internal agency operations and financial systems; and
- Issuing administrative sanctions, including debarments and suspensions to health care providers who pose a financial risk to the FEHBP itself or a health care risk to persons who receive health insurance coverage through the FEHBP.

The Office of the Inspector General recognizes that oversight of the retirement, health benefits, and life insurance trust funds administered by OPM is, and will remain, its most significant challenge. These trust funds are among the largest held by the United States Government. Their assets totaled \$789.3 billion in fiscal year 2007, their receipts were \$97.1 billion, and their annual outlays were \$153.7 billion. The amounts of their balances are material to the integrity of the Government's financial position. I continue to allocate the vast majority of the Office of the Inspector General's efforts and resources to trust fund oversight, and we remain fully committed to trust fund activities.

OPM makes outlays from the retirement trust funds in the form of payments to millions of Federal annuity recipients. The health insurance trust fund provides payments to approximately 270 health insurance plans nationwide. In turn, the health insurance carriers pay millions of claims for services filed by their enrollees and health care providers. We have shown through our audits and investigations

that such health insurance payments may be at risk through improper, inaccurate or fraudulent claims.

We are obligated to Federal employees and annuitants to protect the integrity of their earned benefits. Our audit and criminal investigative work reduces losses due to fraud and improper payments and recovers misspent funds whenever possible. We have a special obligation to the Federal agencies and the American taxpayers, who provide the majority of the funding. We also seek to deter future occurrences of fraud and abuse within OPM programs, as well as serve to protect the health and welfare of beneficiaries of OPM programs and services.

Audits and criminal investigations of the OPM-administered trust fund programs have resulted in significant financial recoveries to the trust funds and commitments by program management to recover additional amounts. From fiscal year 2005 to the present, our office has cumulative judicial recoveries and audit recommendations to recover funds exceeding \$440 million.

Beginning in 2005, the Office of the Inspector General established a nationwide field structure. As of 2008, the office has eighteen investigative and two audit field offices in addition to its headquarters in Washington, DC. We have determined that the most effective deployment of investigative staff is to locate them in areas of the country where FEHBP and retirement benefits are more concentrated. Experience has shown that criminal investigators located in these areas often work in cooperation with other law enforcement entities similarly located, resulting in additional criminal leads and better protection of OPM programs. In many instances, criminal investigators located outside of Washington, DC work exclusively on cases referred to them by local authorities. During fiscal year 2007, investigative work resulted in 46 arrests, 66 indictments, and 50 convictions.

During fiscal year 2009, we will continue to conduct audits of pharmacy benefit managers (PBMs), firms contracted by FEHBP carriers to administer their prescription drug programs. The premiums paid for prescription drug coverage have risen exponentially over the last ten years and allegations against PBMs have also increased. It is estimated that approximately \$9.2 billion was paid during 2007 in prescription drug premiums to experience-rated and health maintenance organization (HMO) carriers. This represents approximately 28 percent of experience-rated and HMO carrier premiums paid for health benefits coverage for Federal employees and annuitants. In fiscal year 2007, we settled a large civil health care fraud claims case against an FEHBP PBM, resulting in \$97 million returned to the OPM trust fund. We remain steadfast in our efforts to audit and investigate pharmacy benefits and pharmaceutical fraud within the FEHBP.

Also during fiscal year 2009, we will further our development of a data warehouse of health benefits claims. The data warehouse offers the best opportunity for global detection of erroneous health benefit payment transactions by medical providers, insurance carriers and subscribers by accumulating all benefit claims for all fee-for-service insurance carriers in a single data repository. This effort will enhance our current claims reviews by enabling the auditors and investigators to target certain types of potential claim payment errors on a program-wide rather than on a plan-by-plan basis. This will provide a significant improvement in our audit efficiency and effectiveness by offering us the opportunity to address significant issues of broad concern on a coordinated basis and to recover overcharges to the program when appropriate.

Currently in the data warehouse, we have data for the top three experience-rated carriers (Blue Cross Blue Shield, Mail Handlers Benefit Plan, and Government Employees Health Association), representing 86 percent of experience-rated plans claims payments. We are also receiving data from HMO plans with over 500 subscribers. This includes 85 plans, representing 87 percent of the HMO plans claims payments. The data is being accumulated and used for basic analysis to support premium rate calculations. Starting in fiscal year 2009, we plan to introduce more advanced claims analyses which recognize potential high risk areas for community-rated carriers.

Our administrative sanctions program has continued to improve its effectiveness in protecting the FEHBP and its enrollees against untrustworthy health care providers. This program enforces the FEHBP sanctions statute, which authorizes suspension or debarment of providers on the basis of 18 different categories of violations. The most frequently-encountered violations represent criminal convictions or loss of professional licensure. The highest priority sanctions cases involve providers who are the subject of investigation by our Office of Investigations. We select cases for action on the basis of the seriousness of the provider's violations and the risks that the provider poses to the FEHBP and to the health and safety of its subscribers. We currently have over 30,396 active debarments and suspensions in ef-

fect. We recently completed the conversion and digitizing of our debarment and suspension paper files and records to an electronic, searchable database.

Thank you for this opportunity to present our office's resource request for fiscal year 2009.

SELECTIVE SERVICE SYSTEM

PREPARED STATEMENT OF THE HONORABLE WILLIAM A. CHATFIELD, DIRECTOR

FORWARD

Chairman Durbin and members of this subcommittee, I am honored as Selective Service Director to present the President's fiscal year 2009 appropriations request of \$22,000,000 for the agency. The Congress and administrations under both parties have acknowledged the wisdom of maintaining Selective Service as a hedge against unforeseen threats and as a low-cost insurance policy against underestimating any threat our Armed Forces might face in a still-dangerous world.

This agency is as determined as ever to make the necessary adjustments to budget realities and the requirements of combating terrorism, defending the homeland, and maintaining other priorities listed in the President's January 28, 2008, State of the Union Address. Personnel reductions at Selective Service have resulted from planned attrition and will not involve a reduction-in-force. Meanwhile, the agency continues its phased reductions in operational readiness while preserving as much customer service as possible. For example, we are reducing the number of part-time Reserve Component officers from a total of 250 to 200 by the end of fiscal year 2008 and to 150 by the end of 2009. Automated registrations are making it possible to accomplish our missions without the need for as much face-to-face contact at the local level. These innovations have required painful choices, but satisfying our goals will assure a Selective Service that is beyond reproach, while meeting the needs of its primary customer, the Department of Defense. I welcome the challenge and appreciate the opportunity to share my vision for Selective Service with you today.

WHAT WE DO TODAY

Selective Service is in business to perform two unique functions. Should the Congress and the President authorize a return to military conscription, the agency can conduct a draft that is efficient, fair, and accepted by the public. It is also ready to administer a program of alternative community service for men who are classified as conscientiously opposed to military service.

Additionally, each and every day Selective Service continues its close partnership with the Department of Defense by providing direct support to Armed Forces recruiting. Specifically, Selective Service provides names of registrants to the Secretary of Defense for recruiting purposes, in accordance with the Military Selective Service Act. Information about Armed Forces opportunities for Active Duty, National Guard, and Reserves, along with a business reply card, is enclosed routinely with our registration acknowledgment that Selective Service sends to each new registrant. For fiscal year 2007, these contacts totaled nearly 2.2 million young men. Consequently, the Defense Department benefits by "piggy-backing" on our routine mailings which generate actual recruiting leads. And it reimburses us for the additional costs in accordance with the Economy Act.

Beyond its compliance with the Military Selective Service Act and providing these tangible services, the agency also promotes an intangible national benefit. For present and future generations of America's young men, Selective Service is a very critical link between society-at-large and today's volunteer military. It is a reminder that, as Americans, every young man is personally responsible to "provide for the common defence" in the time-honored tradition of preceding generations.

AREAS OF EMPHASIS

Air Shows.—I look forward once again in 2008 and continuing in 2009 what I regard as this agency's most creative innovation in meeting its traditional mission in a climate of budget austerity. I refer to our success in harnessing the venue, excitement, and patriotism of air shows.

My vision has been to present the agency in huge, open community venues across the Nation, highlighting authentic American heroes and promoting public service and patriotic themes appealing to multiple generations. The value of this effort presented itself after my assessment of the agency's capabilities, priorities, and missions. Air shows are the second most attended spectator events in America, attracting a high concentration of registration-age men. I remain convinced that funding

this initiative results in a substantial increase in registration compliance and represents a positive impact on the influencers of young men. We are conducting this effort by absorbing the \$118,000 expense out of our fiscal year 2008 budget and will do so again in fiscal year 2009. No new money is involved.

Registration Compliance.—As exciting as the air show initiative has been, it will not be the only effort to satisfy our statutory missions. Our operational readiness to perform our traditional missions has been reduced because of world risk assessments. Selective Service has always believed only when all eligible young men are in the manpower pool and accounted for as equally vulnerable would any future draft be considered completely fair and equitable by the public.

Our latest full year of data collection (CY 2007) indicates 91 percent of legally eligible men (ages 18 to 25) are registered; this is a 2 percentage point drop from the previous year. The compliance rate for men who are draft eligible (ages 20 to 25) is 95 percent, a 1 percentage point decrease from CY 2006. Keeping the rates high is very important because a declining compliance rate contributes to a lack of public confidence in our ability to administer a fair and equitable draft.

Naturally, this agency is as determined as ever to make congressional priorities truly our own. We appreciate the subcommittee's support for ensuring that our work continues. To the extent that our traditional mission survives, I will use every resource to continue to maintain high registration compliance. For example, the agency will:

Carry on routine updating of the interactive Selective Service pages on the World Wide Web (www.sss.gov) where online registration, registration verification, the ability to file changes of information, and a wealth of other agency information are available to anyone with access to the Internet. For fiscal year 2007, 83 percent of registrations reached Selective Service through electronic means, the same percentage as 2006. Electronic registrations are encouraged because they are quicker, more cost-effective than processing paper registrations, and provide better customer service. We are also placing links to our site with other Federal, State, and local agencies, schools, and assorted organizations to enhance public education and facilitate customer responsiveness.

Profit from an increasing number of States that link obtaining a driver's license or State identification card to the Selective Service registration requirement. These State and territorial laws currently provide Selective Service with an average of 71,000 registrations per month. As of this month, 36 States, 3 territories, and the District of Columbia have enacted laws. These jurisdictions represent 70.1 percent of the national 18-year-old male registrant population. We continue to offer technical expertise to the other States where such legislation is pending. Data electronic exchanges are the most cost-effective, timely, and user-friendly registrations available. Selective Service is committed to aid the remaining 14 States in implementing this easy method to protect their young men's eligibility for State and Federal benefits and programs. This program has been a valuable tool to reach all eligible registrants and is more customer-friendly.

Remain sensitive to the fact that not every household in your district has a computer, so technological innovations will not compensate for all resource restraints. The only way for young men in those households to register is the old-fashioned, pre-Internet way. That means going to the nearest post office. And that is why we must devote sufficient resources to printing forms and keeping post offices well stocked.

Alternative Service Program.—Half of the agency's mission during any return to conscription is to provide for a supervised term of alternative civilian service for all men it classifies as conscientious objectors. A key component of this program, therefore, is reaching out to employers capable of providing work of "national importance" by becoming members of the Alternative Service Employer Network, or ASEN. We continue to reach out to historic peace church constituencies, non-profit organizations, and Government entities. These have, in past wars, provided the bulk of the assignments we will need to provide our alternative service workers with employment that benefits the national health, safety, and welfare.

We have had negotiations with Christian Aid Ministries, Mennonite Voluntary Services, and others who hope to join the ASEN. We also continue to have our State Directors visit the projects run by these organizations to determine their suitability to become ASEN members. In addition to visiting model project sites, our State Directors have begun to reach out to our historic conscientious objector constituencies across America. These contacts and outreach efforts were previously confined to our headquarters staff. In addition to making it easier and less expensive for the public to stay in touch with us, this field effort facilitates the building of the relationships we will need to successfully meet our goals for this program during any return to conscription.

Finally, we continue to work toward obtaining employer agreements with the Public Health Service and the Corporation for Community and National Service. These two Federal entities will, we hope, play a key role in providing suitable employment to conscientious objectors in any future conscription.

Information Technology Modernization.—The agency's Reclassify, Compliance, and Verification project is intended to allow Selective Service System to leave the Department of Defense's Military Entrance Processing Command mainframe and move to a Microsoft Windows system. However, it is behind schedule. Selective Service hopes to complete the analysis, scope, and requirements definition during fiscal year 2008, and we plan to design, code, and test in fiscal year 2009. Notwithstanding resources expended so far, if our revised schedule is not met, then the entire project will be shelved pending future resources and commitment.

NATIONAL IN SCOPE, LOCAL IN SERVICE

While rumors of a future draft will continue to circulate among the public, private groups, the media, and academia, Selective Service remains focused on missions mandated by Congress. It manages its volunteer board members; prepares to administer a program of alternative community-based service for men classified as conscientious objectors; and, to the extent possible, updates its conscription plans and registration procedures. All these efforts are aimed at being ready to conduct a fair and equitable classification procedure to determine who should serve when not all can serve during an emergency. To ensure fairness and equity, each Selective Service board is a gathering of civic-minded men and women reflecting the racial, cultural and ethnic diversity of the young men in your districts. Through these volunteers, a unique bond has been formed at the grass roots with young American men, society-at-large, and the U.S. Armed Forces. Through the Selective Service structure, local American communities play a positive role in providing for the common defense.

CLOSING

Mr. Chairman, Selective Service stands prepared to perform its time-tested responsibilities when directed. The fiscal year 2009 appropriation request of \$22,000,000 will be invested prudently in one of the Nation's important security assets in an increasingly dangerous and ambiguous world. Maintaining this adequate funding level would: (1) provide a compact, cost-efficient civilian structure capable of expansion in a crisis; (2) provide manpower to the U.S. Armed Forces as required; and (3) do it fairly, equitably, and within the necessary timeframes. These outcomes will advance our statutory mandate and restore the high registration compliance rates so painstakingly achieved over the last decade. Selective Service remains an active partner in the national preparedness community, ever watchful for opportunities to improve.

Thank you, Mr. Chairman. I would be pleased to answer your questions.

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA

PREPARED STATEMENT OF PAUL A. QUANDER, JR., DIRECTOR

The Court Services and Offender Supervision Agency (CSOSA) supervises approximately 15,000 men and women offenders on probation, parole, or supervised release in the District of Columbia at any given time. CSOSA includes the D.C. Pretrial Services Agency, which supervises another 5,000 defendants at any given time to ensure that they comply with court-imposed release conditions and appear for scheduled court dates. These agencies make a vital contribution to public safety in Washington, D.C.

This statement is provided in support of CSOSA's fiscal year 2009 budget request of \$202,490,000 including 1,297 permanent positions and 1,293 full time equivalents (FTE). Of this amount, \$54,838,000 is requested for the Pretrial Services Agency (PSA) and \$147,652,000 is requested for the Community Supervision Program (CSP). The fiscal year 2009 request for CSOSA represents a \$12,147,000, or 6 percent, increase over fiscal year 2008 enacted levels.

BACKGROUND

Since CSOSA was created under the National Capital Revitalization and Self-Government Improvement Act of 1997, we have implemented significant program enhancements, particularly in post-release supervision. Probation and parole caseloads

have been lowered dramatically—in many cases by 50 percent—to meet or exceed the recommended national standard of 50 cases per Community Supervision Officer (CSO). Since fiscal year 1999, monthly surveillance drug testing has increased 360 percent; last year, over 8,300 offenders were tested each month. CSOSA operates six field offices to locate CSOs in the neighborhoods where offenders live and work, and over 8,000 joint field visits by CSOs and the Metropolitan Police Department occurred in those neighborhoods last year. Since fiscal year 2004, CSOSA has placed over 2,000 high-risk offenders on Global Positioning System (GPS) monitoring to reinforce compliance and track their location; the Metropolitan Police Department routinely uses GPS data in crime investigation.

CSOSA has also received resources for contract substance abuse treatment to supplement the District's public treatment system. Last year, we made over 2,400 offender and over 1,600 pretrial defendant placements in our continuum of services, which includes detox, residential, transitional housing, and outpatient services. We also continue to implement the Reentry and Sanctions Center, a residential program that provides intensive assessment and treatment readiness services for high-risk offenders and defendants. Since the facility's opening in 2006, we have placed 1,188 individuals in the program; 88 percent have completed it successfully.

CSOSA recognizes that successful supervision involves both managing risk through close supervision and addressing need through the provision of treatment and support services. We have implemented many enhancements to ensure effective risk management. We work closely with a variety of Government, non-profit, and faith-based partners to increase offenders' access to existing services and build additional capacity in the core need areas of housing, education/training, and health care. Through the Criminal Justice Coordinating Council's Reentry Steering Committee, we provide leadership of efforts to address the needs of supervised offenders, particularly those returning to the District from incarceration.

One of our most significant accomplishments of the past year has been the implementation of a new performance management system (SMARTStat) that tracks a core set of supervision practices down to the individual case level. Through this system, we can determine the extent to which cases are being managed effectively. This information is available to supervisors and branch chiefs, who are encouraged to use it as part of their case audits and team meetings. The information forms the basis of regular reviews with the entire CSP executive staff, during which action items are assigned and outcomes regularly tracked so that problems can be solved quickly.

2009 BUDGET INITIATIVES

CSOSA's fiscal year 2009 budget contains two initiatives, one for CSP, which provides information technology resources for post-release supervision, and one for PSA, which provides resources for supervision of D.C. Misdemeanor and Traffic Court (drunk driving) cases.

CSP Information Technology Enhancement Initiative

CSP requests \$2,583,000 and ten (10) positions to continue building its information technology infrastructure, including enhancements to the Supervision Management Automated Records Tracking (SMART) case management system.

Improving the quality, management, and utility of information has been a CSP priority since CSOSA's founding. CSP inherited outdated, cumbersome legacy systems from its predecessor agencies. In 1997, most probation and parole officers relied on paper case files and lacked access to personal computers. Developing an automated case management system and training staff to use it were essential to successful implementation of the agency's program strategy. CSP launched the initial version of SMART in 2002, following a remarkably efficient requirements gathering and application development process.

SMART is now in its third release. From its initial core supervision tracking functions, the system has expanded to encompass modules that capture treatment placement and expenditures, the development of Alleged Violation Reports, vocational and education assessment, and other critical program functions. We are also developing an Enterprise Data Warehouse (EDW) as a repository for historical data that can be used for research and performance measurement. The EDW is the source of CSP's new performance management system, SMARTStat, which provides management and staff with complete visibility into offender supervision practices and effectiveness. CSP also developed and maintains the District's Sex Offender Registry (SOR).

CSP's Office of Information Technology (OIT) develops and maintains the CSP infrastructure, including acquisition, support, maintenance, and life-cycle replacement of architecture/design/systems enhancements, the EDW, IT security services, disaster recovery, and operational services, such as customer support (Help Desk), net-

work management, change and configuration management, e-mail, and system administration services.

The requested resources will continue the significant progress made by CSP OIT to increase the timeliness and accuracy of data used by agency staff and our partners to make day-to-day law enforcement decisions affecting public safety in the District. These resources will be used to continue SMART and SOR enhancements, transition to a next-generation Service Oriented Architecture platform, continue building the EDW and performance management platform, and continue improving our capacity to integrate data with our partner agencies.

The resources will be allocated as follows:

Infrastructure Enhancements

- \$300,000 in contract funding to support EDW software, development and maintenance;
- Five (5) New Positions: Two Systems Engineers (GS-13); One infrastructure Architect/Project Manager (GS-14); One Customer Support Specialist (GS-8); One EDW Database Administrator (GS-13).

SMART Enhancements

- \$1,000,000 in contract funding to support SMART, SOR and Data Sharing development and maintenance;
- Five (5) New Positions: One Systems Integration Architect (GS-14); One Systems Integration Analyst (GS-13); One Configuration Manager (GS-13); One Business Intelligence Analyst (GS-13); and One Technical Writer (GS-13).

CSP OIT currently lacks sufficient staff to sustain operations and to plan and implement migration to an “agile” service-based infrastructure. Current CSP funding does not provide sufficient ongoing resources to maintain the current IT infrastructure and continue the SMART development process. To date, CSP has been able to support the significant SMART and IT infrastructure accomplishments through delayed operational costs at two new field units. One of those field units (Rhode Island Avenue) became operational in fiscal year 2006, and the other is planned for implementation in fiscal year 2009. Without the requested fiscal year 2009 resources, planned SMART, partnership/data sharing and infrastructure improvements will be significantly reduced, affecting the effectiveness and efficiency of CSP and our law enforcement partners.

Lack of additional resources will effectively derail investments made in our information technology (IT) infrastructure over the past 2 years, most of which were implemented to comply with Federal IT mandates for security, disaster recovery and performance management. It is vital that CSOSA have the IT capability to effectively perform its law enforcement and public safety functions for the Nation’s capital. Compared to its Federal counterparts, CSOSA is still very new and very small. We are still in need of funding for critical IT infrastructure and developmental initiatives to implement the full scope of the local public safety functions that CSOSA was created to assume.

PSA Misdemeanor and Traffic Court Supervision Initiative

In our other new budget initiative, PSA requests \$3,340,000 and 23 positions for defendant supervision, substance abuse and mental health assessments, and drug testing services for D.C. Misdemeanor and Traffic Court (drunk driving) cases.

In 2006, the Office of the Attorney General’s (OAG) Criminal Section papered over 12,400 D.C. misdemeanor and traffic cases. Based on estimates from the OAG’s Public Safety Division and the D.C. Superior Court, over 3,600 of these cases (29 percent) involved defendants in need of mental health and/or substance abuse treatment services. To better address the problems and community safety issues within this population, beginning in fiscal year 2009, the D.C. Superior Court and OAG will lead a court-centered, problem-solving initiative geared to the unique problems and service requirements of mentally ill and substance abusing arrestees. This initiative will identify mental health and substance abuse issues in this population and link defendants to community-based services; ensure the least restrictive diversion and community supervision options needed to address public safety and treatment concerns; ensure comprehensive and individualized treatment and supervision placements; provide a comprehensive team-oriented approach to addressing health and social issues geared to a defendant’s criminal behavior; and provide supervision of participants, including court notice for infractions of supervision conditions.

The initiative already has the support of many local criminal justice and community partners. Defendants will be referred to the District of Columbia’s Addiction Prevention and Recovery Administration (APRA) and the Department of Mental Health (DMH) for needed treatment services. DMH also will establish a crisis care center within the D.C. Superior Court to temporarily assist defendants with severe

mental health issues. The city's Department of Employment Services (DOES) will offer job referral and training geared to the special needs of this population.

The missing elements of the program design are strong defendant supervision and drug testing, as well as assessments for and linkages to needed treatment and social services in the community. Therefore, the D.C. Superior Court and the OAG have requested that PSA provide supervision, substance abuse and mental health assessments, linkage to treatment, and drug testing services. Supervision would include conditions such as weekly drug testing, in-person contact as needed with a case manager, and referrals to treatment and social service agencies. Besides helping the OAG, the Court, and other collaborative partners meet an important strategic goal, this assistance would help PSA meet its statutory obligation under D.C. Code § 23-1303(h) to provide supervision to all defendants released with conditions and to address within this population what potentially may be unacceptable safety risk to the Washington metropolitan community.

To ensure proper management of treatment and other conditions, as well as prompt administrative and judicial responses to infractions, PSA recommends a maximum case manager-to-defendant ratio of 1:75.

The proposed request would fund the following supervision, drug testing, and treatment assessment personnel costs: 12 Pretrial Service Officers; 1 supervisory Pretrial Service Officer; 3 Community Treatment Specialists; 2 Chemists; 1 Laboratory Technician; 3 Drug Testing Technicians; 1 Program Assistant; and \$120,000 for drug testing supplies (chemical reagents).

PSA data supports enhanced supervision for defendants charged with serious traffic offenses as well as misdemeanants with serious mental health and substance abuse needs. Drug-involved defendants are three times as likely to be rearrested and more than twice as likely to fail to appear as non-users. Introducing pretrial supervision to the high risk defendants in D.C. Misdemeanor and Traffic Court who have mental health and substance abuse challenges will assist the Court in enhancing public safety and assuring that these defendants keep their court dates.

This initiative will also enhance PSA's collaborations with the D.C. Superior Court, OAG, and other criminal justice and community partners. The proposed initiative is a combined effort to screen, assess, and supervise potentially high-risk defendants who now receive little or no supervision and support. No other partner in this initiative can provide the assessment, supervision, and drug testing of this population; these services are needed to ensure court appearance and protect the public.

Adjustments to Base

CSOSA also requests \$6,224,000 in adjustments to base to fund employee cost of living pay raises and general price increases. Of this amount, \$4,620,000 is for CSP, and \$1,604,000 is for PSA.

CONCLUSION

CSOSA's budget initiatives reflect the developmental challenges the agency continues to face. While CSP has implemented a wide range of program enhancements, such progress necessitates ongoing maintenance and expansion of IT infrastructure to ensure that our ability to manage cases efficiently, analyze data, and measure performance keeps pace with our operations. PSA continues to face the need to collaborate with and support its partners—most particularly, Superior Court—by participating in initiatives that will enhance defendant compliance and protect the public.

Unless CSOSA responds to these challenges, we are at risk of losing the ground we have gained. These initiatives will enable us to continue building and supporting a model supervision system that achieves the benefits CSOSA was established to bring to the District of Columbia: increased public safety, reduced recidivism, and enhanced systemwide collaboration.

We appreciate the support we have received to date, and we look forward to working with the Committee on this request.